CONTESTING POLICE CREDIBILITY

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Abstract: Criminal cases often amount to credibility contests between two actors: the complainant, testifying for the government, and the defendant. In theory, the defendant's opportunity to attack the credibility of government witnesses should be equal to or greater than the government's opportunity to attack the credibility of the defendant, given that the defendant has a constitutional right to a fair trial. But when the government's witnesses are police officers, the converse occurs. Although the phenomenon of police officers lying at trial is so well documented that it has its own euphemism, "testilying," the law imposes tremendous obstacles to defense counsel obtaining and utilizing evidence about officers that would call into question their credibility as witnesses.

The thesis of this Article is that, when it comes to helping a jury assess the credibility of defendants and police officer witnesses, the law gets it backward. On the one hand, our data collection systems and evidentiary doctrines allow the government nearly instant access to a defendant's entire history of encounters with the law, disincentivize defendants from testifying at their own trials, and give prosecutors myriad means to introduce evidence suggesting that the defendant is, based on prior misdeeds, likely to be guilty of the charged crime. On the other hand, the law perversely prevents defendants from casting doubt on the credibility of police officers, by making police misconduct records confidential and, in many cases, inaccessible to defendants. This unequal distribution of access and ability to utilize information creates trials where the jury is exposed to extensive evidence suggesting the accused is an incredible, and likely guilty party, but remains naïve to the many reasons to question the credibility of the police officer.

This Article, while grounded in a rich tradition of scholarly literature critiquing the many ways the American criminal system venerates law enforcement and represses people of color, provides a novel contribution to that literature by exposing the particularly problematic imbalances that result when the government is not only prosecuting a defendant, but also acting as his primary accuser. After thoroughly analyzing the doctrines that enable these inequities, this Article provides recommendations for reform in three areas: (1) the lack of thorough recordkeeping and accurate data pertaining to police misconduct; (2) the laws that prevent defense counsel from accessing and utilizing police misconduct records that do exist; and (3) the evidentiary rules that permit governments to access and utilize bad acts and character evidence against defendants.

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INTRODUCTION

Criminal trials often amount to credibility contests between two primary actors: the complainant or accuser, testifying for the government, and the defendant. If a defendant invokes a right not to testify,[1] the verdict

1. Although statistics regarding the percentage of defendants who testify at their own trial are not available at a national level, some scholars put the number at approximately 50%. *See* Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1356–57 (2009) (studying data from more than 300 criminal trials to conclude that 60% of defendants without criminal records, and 45% of defendants with criminal records, testified in those cases); Gregory M. Gilchrist, *Trial Bargaining*, 101 IOWA L. REV. 609, 642 (2016) (citing Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1450 (2005)); Alexandra Natapoff, *supra*, at 1450 (2005) (citing Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-*

may depend entirely on the credibility of the government's witness. Given that the defendant is presumed innocent, one might expect that a defendant's opportunity to attack the credibility of government witnesses would be equal to or greater than the government's opportunity to attack the credibility of the defendant.[2] But when the government's witnesses are police officers, the converse is true.

Police officers testify frequently in criminal cases.[3] In a surprising number of these cases, the police officer is not the investigator or person who responded to a report of crime—what many might conceive of as typical witness roles for police officers—but instead the complainant or accuser.[4] Consider, for example, a case where the defendant is accused of resisting arrest,[5] or assaulting a police officer,[6] or even a simple drug possession charge where a police officer claims to have patted down the defendant and found a controlled substance on the defendant's person.[7] In any of these all-too-common scenarios, the defendant will have virtually no chance of winning at trial unless the defendant can cast doubt on the credibility of the police officer witness.[8] Nonetheless—despite the fact

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Incrimination, 26 VAL. U. L. REV. 311, 329–30 (1991)) (describing a 1980s Philadelphia study in which slightly more than half of defendants declined to testify); *infra* section I.B (discussing some of the reasons defendants may choose not to testify at trial).

2. *See* Taylor v. Kentucky, 436 U.S. 478, 488 (1978) (stating that the risk of unfair conviction is heightened when the trial is "essentially . . . a swearing contest between victim and accused").

3. *See, e.g.*, PAUL BUTLER, LET'S GET FREE: A HIP HOP THEORY OF JUSTICE 102 (2009) (noting that one of a prosecutor's primary responsibilities is "to make the judge and jury believe the police"); JONATHAN SUAREZ, POLICE OFFICER EXAM 50 (2d ed. 2003) (testifying in court is an important part of a police officer's job).

4. For just a few summaries of cases where police officers claimed to be victims, see, e.g., John M. Burkoff, *Aggravated Assault—Case Law—Aggravated Assault on Police Officer*, *in* 14 WEST'S PA. PRAC. SERIES § 1:184 (6th ed. 2018) (summarizing cases involving claims of aggravated assault on police officers); Annotation, *What Constitutes Offense of Obstructing or Resisting Officer*, 48 A. L. R. 746 (1927) (summarizing cases involving offenses against an arresting officer); 6 AM. JUR. 2D *Assault and Battery* § 30 (2017) (summarizing cases where alleged victim was on-duty police officer).

5. *E.g.*, Fallon v. State, 221 P.3d 1016, 1017 (Alaska Ct. App. 2010) (defendant convicted of resisting arrest, where sole testimony regarding the incident came from police officer who claimed defendant resisted arrest).

6. *E.g.*, Foster v. United States, 136 A.3d 330, 332 (D.C. Ct. App. 2016) (defendant convicted of assaulting a police officer, where sole testimony regarding the incident came from police officers who claimed to have been assaulted).

7. *E.g.*, People v. Minniweather, 703 N.E.2d 912, 913 (Ill. Ct. App. 1998) (defendant convicted of possession of a controlled substance, where sole testimony regarding the drug possession came from police officers).

8. *E.g.*, Robinson v. State, 730 A.2d 181, 196 (Md. 1999) (discussing a defendant convicted in case that amounted to credibility contest between police officers and defendant, who provided markedly different versions of events); *see* Jonathan Abel, Brady*'s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 746 (2015) (labeling a criminal defendant's ability to access materials that could cast doubt on an officer's

that the phenomenon of police officers lying at trial is so well documented that it has its own euphemism, "testilying"[9]—the law imposes tremendous obstacles to defense counsel obtaining and utilizing evidence about the officer that would cast doubt on the officer's credibility. Such evidence could come in the form of records showing that the police officer has previously lied in other cases, has a history of using excessive force on civilians, or charges defendants with resisting arrest at a far higher rate than other officers in the department. The legal obstacles to defense counsel obtaining such information manifest themselves in both the absence of records—our legal system is reluctant to require that police departments or prosecutors' offices document police misconduct—and the inability of defense counsel to access and use the records that are deemed confidential in the majority of jurisdictions.[10]

The thesis of this Article is that, when it comes to helping a jury assess the credibility of defendants versus police officer witnesses, the law gets it backward. On the one hand, our data collection systems and evidentiary doctrines allow the government nearly instant access to a defendant's entire history of encounters with the law,[11] disincentivize defendants from testifying on their own behalf,[12] and give prosecutors myriad means to introduce evidence suggesting that the defendant is, based on prior misdeeds, more likely to be guilty of the charged crime.[13] On the other

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credibility a matter of "life and death"); Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 466 (2004) ("When it comes down to whose story to believe—the criminal suspect or the police officer—in situations unlikely to involve other witnesses, the officer has a distinct advantage."); Lauren Ouziel, *Beyond Law and Fact: Jury Evaluation of Law Enforcement*, 92 NOTRE DAME L. REV. 691, 697 (2016) (the conduct of judges and prosecutors indicates agreement that "juror assessment of reasonable doubt is tied up in assessments of law enforcement's conduct").

9. I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 870 (2008) (noting that police lies are "pervasive" and undercharged); *see also* Jennifer E. Koepke, *The Failure to Breach the Blue Wall of Silence: The Circling of the Wagons to Protect Police Perjury*, 39 WASHBURN L.J. 211 (2000) (theorizing that an officer is more likely to be "struck by lightning" than charged with perjury); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1040 (1996) ("[L]ying intended to convict the guilty . . . is so common and so accepted in some jurisdictions that the police themselves have come up with a name for it: 'testilying.'"); Joseph Goldstein, *'Testilying' by Police: A Stubborn Problem*, N.Y. TIMES (Mar. 18, 2018), https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=photo-spot-region&region=top-news&WT.nav=top-news (last visited Aug. 17, 2018).

10. *See infra* Part II.

11. *See infra* section I.A.

12. FED. R. EVID. 609; *see infra* section I.B.

13. FED. R. EVID. 404(b); FED. R. EVID. 413–15; *see also* Edward J. Imwinkelried, *The Second Coming of* Res Gestae*: A Procedural Approach to Untangling the "Inextricably Intertwined" Theory*

hand, the law perversely prevents defendants from casting doubt on the credibility of police officers by making police misconduct records confidential and, in many cases, inaccessible to defendants.[14] This unequal distribution of access and ability to utilize information creates trials where the jury is exposed to extensive evidence suggesting the accused is not credible, but remains naïve to any reasons to question the credibility of the defendant's primary accuser, the police officer.[15]

Several scholars have produced compelling critiques of the way our current evidentiary doctrines invite juror suspicion of defendants and discourage defendants from testifying at their own trials.[16] Others have examined the prosecutorial and procedural favoritism police officers enjoy when they are suspects in criminal cases,[17] and the extreme reluctance of courts to find officers criminally or civilly liable for misconduct on the job.[18] But very few have addressed the way this favoritism reveals itself when police officers are complainants or witnesses in criminal cases. This Article provides a novel contribution to the scholarly literature by exposing the particularly problematic imbalances that result when the government is not only prosecuting a defendant, but also acting as a defendant's primary accuser. When the law allows prosecutors to access and introduce evidence casting doubt on a

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for Admitting Evidence of an Accused's Uncharged Misconduct, 59 CATH. U. L. REV. 719, 728–30 (2010); *infra* section I.C–D.

14. *See infra* Part II.

15. *See, e.g.*, Natapoff, *supra* note 1, at 1459–60 (permitting the government to elicit evidence of a defendant's prior convictions or other bad acts may "dissuade the jury from hearing the substance of the defendant's story, from having sympathy with the defendant, or from disbelieving the government").

16. *See, e.g.*, *id.*; Montré D. Carodine, "*The Mis-Characterization of the Negro*"*: A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521, 524 (2009) (critiquing the racial biases inherent in rules permitting impeachment of defendants); Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977, 1980 (2016) [hereinafter Roberts, *Conviction by Prior Impeachment*] (noting that evidentiary rules permitting prosecutors to impeach defendants "make[ ] it easier for prosecutors to win cases"); William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 361 (1995) (commenting that the "sweeping rhetoric" of the presumption of innocence "continues in the face of practices that are inconsistent with its premises and promises").

17. *See* Kate Levine, *Police Suspects*, 116 COLUM. L. REV. 1197, 1201, 1206 (2016); Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447 (2016); Erwin Chemerinsky, *Opinion, Erwin Chemerinsky: Police Dodge Accountability for Deaths*, ORANGE CTY. REG. (Dec. 7, 2014, 12:00 AM), http://www.ocregister.com/articles/police-644400-officers-jury.html [https://perma.cc/3D3G-FNQ9].

18. *See* Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995 (2017); Rachel Moran, *In Police We Trust*, 62 VILL. L. REV. 953 (2017); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 298 (1997); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 971 (1999).

defendant's credibility, and conversely prevents defendants from obtaining or using evidence that could disprove the credibility of police officers, the resulting imbalances tip the metaphorical scales of justice heavily in the government's favor.

The specific manifestations of partiality toward police officers that this Article explores, and the resulting inequities they create in criminal trials, are natural outgrowths of the deference our criminal system has long afforded government actors. From a philosophical viewpoint, this Article falls within a rich tradition of scholarly literature critiquing the many ways the American criminal justice system venerates law enforcement and represses people of color, enabling societal ills like mass incarceration and a tremendously costly, ineffectual War on Drugs.[19] The context this Article addresses—cases where police officers are not only charging the defendant, but also acting as the defendant's principal accuser—is particularly vulnerable to governmental abuse and unfair outcomes for the people of color who are most likely to be targets of law enforcement suspicion.[20]

This Article proceeds in three parts. Part I discusses the technological resources, data-keeping systems, and evidentiary doctrines that collectively permit the government to access and use extensive collateral evidence to attack the character and credibility of criminal defendants at

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19. *See, e.g.*, Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1883 (2015) (discussing how courts "all too readily defer" to the judgments of police officers); Lenese C. Herbert, *Can't You See What I'm Saying? Making Expressive Conduct a Crime in High-Crime Areas*, 9 GEO. J. POVERTY L. & POL'Y 135, 149 (2002) ("Courts regularly presume that apprehending officers operate solely out of good motives and the desire to achieve fairness; however, evidence shows that in high-crime areas, this presumption is often false."); Robin K. Magee, *The Myth of the Good Cop and the Inadequacy of Fourth Amendment Remedies for Black Men: Contrasting Presumptions of Innocence and Guilt*, 23 CAP. U. L. REV. 151, 154–55 (1994) (discussing how in cases involving claims of police brutality against a black man, "[t]he playing field is unevenly tilted in favor of the police officer . . . the Supreme Court has fostered and promoted a paradigm that has privileged the often white police officer with a presumption of innocence"); Moran, *supra* note 18; Anthony O'Rourke, *Structural Overdelegation in Criminal Procedure*, 103 J. CRIM. L. & CRIMINOLOGY 407, 409 (2013) (citing numerous U.S. Supreme Court cases where the Court was faced with condemning or deferring to police officers' judgment, and chose to defer to the officers). *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW (2010).

20. *See* ALEXANDER, *supra* note 19, at 20–58 (discussing the historic subjugation of African Americans by those in power in the United States); Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245, 245 (2010) (discussing how one of the traditional functions of police officers has been to create "'white only' space"); Linda S. Greene, *Before and After Michael Brown—Toward an End to Structural and Actual Violence*, 49 WASH. U. J.L. & POL'Y 1, 9–13 (2015) (discussing the United States' history of racialized violence inflicted by, or with the support of, the government against racial minorities); David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 659–60 (1994) ("being stopped for nothing—or almost nothing—has become an all-too-common experience" for African Americans and Hispanics); Sklansky, *supra* note 18, at 313–15 (describing the "distinct[ive]ly different" and humiliating way police officers tend to treat people of color during traffic stops).

trial. Part II articulates how, in contrast to the ease with which prosecutors can access information about criminal defendants, our criminal system actively prevents defendants from obtaining and using evidence that would diminish the credibility of police officer witnesses.

Lastly, Part III provides recommendations for reform in three areas: (1) the lack of requirements for rigorous recordkeeping and accurate data pertaining to police misconduct; (2) the laws that prevent defense counsel from accessing and utilizing police misconduct records that do exist; and (3) the evidentiary rules and practices that permit governments to access and utilize other acts and character evidence against defendants. In Part III, I propose a model statute that jurisdictions can employ as a tool for ascertaining when and how to disclose police misconduct records in criminal cases, as well as specific amendments to existing federal and state evidentiary doctrines.

I. GOVERNMENT ACCESS TO AND USE OF DEFENDANTS' PRIOR HISTORY

Defendants in the American criminal justice system face prosecutors who have ample collateral means to attack both their credibility, if the defendants testify, and their innocent character, if they do not. As soon as a defendant is charged with—or even suspected of—a crime, the machinery of the government begins digging into the defendant's past. Police officers and prosecutors can learn, with a few clicks of a button, whether the defendant has ever been convicted, charged, or even merely arrested for any prior crimes.[21] With a bit more effort, the government can access police reports pertaining to these prior arrests or charges, which include names and addresses of witnesses to the prior allegations, photographs, and statements made by the defendant.[22] If *inter alia*, the defendant is a suspected gang member or terrorist,[23] "immigration violator,"[24] or the subject of a protective order,[25] the government can also quickly find out if the defendant is believed to be "violent toward law

21. *See National Data Exchange (N-Dex) System*, CRIM. JUSTICE INFO. SERVS., FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/services/cjis/ndex [https://perma.cc/CL6C-WWVC].

22. *Id.*

23. *See National Crime Information Center (NCIC)*, CRIM. JUSTICE INFO. SERVS., FED. BUREAU OF INVESTIGATION [hereinafter NCIC], https://www.fbi.gov/services/cjis/ncic [https://perma.cc/C9KK-QQFC].

24. *Id.*

25. *Id.*

enforcement,"[26] has a warrant out for arrest in another state or country,[27] has been denied an attempt to purchase a gun,[28] was charged with an offense as a juvenile delinquent,[29] or was a party to divorce proceedings, a landlord-tenant dispute, or other civil cases.[30] The government's access is not limited to incidents reported in the same jurisdiction as the charged crime; the defendant's history, both civil and criminal, is an open book for law enforcement virtually anywhere in the country.[31]

The law affords the government a variety of means to use this information against the defendant at trial, as collateral evidence helping the prosecution prove the defendant guilty of the charged offense.[32] In some cases, evidence of a defendant's prior history is elicited under the guise of proving, for example, the defendant's "motive" or "intent" to commit the crime,[33] or arguing that the defendant is simply less believable because of a criminal history.[34] Juries are also allowed to hear evidence of other misconduct by the defendant in order to help them understand the "context" of the charged crime.[35] Nearly all of these doctrines allow the government to introduce evidence of criminal allegations that were never charged, let alone proven beyond a reasonable doubt.[36]

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26. *Id.*

27. *Id.*

28. *Id.*

29. Includable Offenses, 28 C.F.R. § 20.32 (2004); BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, USE & MANAGEMENT OF CRIMINAL HISTORY RECORD INFORMATION: A COMPREHENSIVE REPORT 2, 23 (1993), https://www.bjs.gov/content/pub/pdf/CCHUSE.PDF [https://perma.cc/3WZC-8BXX].

30. *See, e.g.*, *Colorado Courts Record Search*, LEXISNEXIS, https://www.cocourts.com/cocourts/secure/authenticated/Search.xhtml [https://perma.cc/FCG9-JKGQ] (showing a Colorado state court records search, permitting requester to search records of all criminal, civil, small claims, domestic, and traffic cases involving any named individual); *Magisterial District Court Docket Sheets*, UNIFIED JUD. SYS. OF PA. WEB PORTAL, https://ujsportal.pacourts.us/DocketSheets/MDJ.aspx [https://perma.cc/9G6L-DV8L] (showing a Pennsylvania state court public records search, allowing participants to search for all state cases by participant name); *District and Municipal Court Case Search*, WASH. COURTS, https://dw.courts.wa.gov/index.cfm?fa=home.cljsearchName&terms=accept&flashform=0 [https://perma.cc/6R7Q-MZ4D] (showing a Washington state court public records search, disclosing all district or municipal cases involving any specified individual).

31. *See* NCIC, *supra* note 23.

32. *Supra* notes 12–13.

33. *See* FED. R. EVID. 404(b).

34. *See* FED. R. EVID. 609.

35. *E.g.*, People v. Quintana, 882 P.2d 1366, 1373 (Colo. 1994) (allowing the introduction of evidence that was not part of the criminal "transaction" to provide the fact-finder with a complete understanding of the events surrounding the crime).

36. *Compare* FED. R. EVID. 609 (permitting the government to use prior convictions to impeach defendant's credibility), *with* FED. R. EVID. 404, 413–15, 608 (permitting the government to introduce

Collateral evidence about a defendant's history or character is an enormously powerful tool for the government to persuade jurors that the defendant is guilty of the charged offense. Courts have long recognized that jurors are "over persuaded"[37] by evidence of a defendant's prior history, and are less likely to believe or presume the defendant innocent if they hear damning evidence about the defendant's past.[38] Instead, jurors who learn about a defendant's criminal history or poor character are much more likely to jump to the conclusion that, because the defendant has done something bad in the past, the defendant is a bad person and necessarily more likely to have committed the charged crime.[39] That, as one court has noted, is "of course . . . why the prosecution uses such evidence whenever it can."[40]

Part I of this Article details the methods by which the law tracks defendants' every encounter with the legal system and then affords prosecutors the ability to both access and use their prior history as evidence that the defendant is guilty of the charged offense. I begin by discussing the expansions in recordkeeping over the past several decades, and then progress through the major rules and doctrines that enable the government to use these records as evidence of guilt at trial.

A. Expanding Government Access to Defendants' Prior History

One consequence of the technology revolution in the past several decades has been a drastic expansion in the government's ability to access evidence about a defendant's criminal history. When this country's legal

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evidence bearing on defendants' credibility or character, without requiring the evidence to be proven beyond a reasonable doubt).

37. Michelson v. United States, 335 U.S. 469, 475–76 (1948).

38. *See id.* at 476; United States v. Foskey, 636 F.2d 517, 523 (D.C. Cir. 1980) (noting that evidence of a defendant's "bad" past is "inherently damaging" to the defendant at trial); United States v. Myers, 550 F.2d 1036, 1044 (5th Cir. 1977); People v. Molineux, 61 N.E. 286, 293–94 (N.Y. 1901) (finding that the prohibition on propensity evidence exists because such evidence detracts from the presumption of innocence).

39. *E.g.*, Spencer v. Texas, 385 U.S. 554, 575 (1967) (Warren, C.J., concurring in part and dissenting in part) (noting that propensity evidence contradicts the presumption of innocence); *Myers*, 550 F.2d at 1044; *see also Michelson*, 335 U.S. at 475–76; People v. Zackowitz, 172 N.E. 466, 468 (N.Y. 1930) (both juries and judges are heavily persuaded by propensity evidence); JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 58.2, at 1212 (3d ed. 1983) (discussing the tendency for jurors to rely on propensity evidence when deciding to convict).

40. Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (labeling the idea that jurors will disregard their biases when instructed to do so an "unmitigated fiction"); *see also* United States v. Johnson, 27 F.3d 1186, 1193 (6th Cir. 1994); United States v. Peden, 961 F.2d 517, 520 (5th Cir. 1992) (noting that even when a jury is unsure about the States' evidence as to the charged offense, they will likely convict if they believe the defendant to be a bad person).

system was founded, technology was, to state the obvious, vastly more limited than it is now. Eighteenth- and nineteenth-century prosecutors had no access to computers, let alone national databases that instantly recall and compile information on every criminal charge or arrest a defendant has ever faced. Fingerprint registries did not yet exist.[41] Even leading into the latter third of the twentieth century, prosecutors had limited means of learning about a defendant's prior history, absent some widespread notoriety on the defendant's part.[42]

Today's prosecutors operate in a very different world. In 1971, the National Crime Information Center began using computers to store criminal history data and files from both state and federal criminal cases.[43] In 1983, the Federal Bureau of Investigation debuted the Interstate Identification Index, which serves as a unified compendium allowing law enforcement access to both state and criminal justice records.[44] In the 1990s, after passage of the Brady Handgun Violence Prevention Act (the Brady Act),[45] Congress established the National Criminal History Improvement Program, which provided financial assistance to states seeking to improve their criminal record databases.[46] The 2002 E-Government Act,[47] in turn, required federal agencies and courts to make criminal records available and accessible online to third parties.[48] Even

41. *See Fingerprint America History*, FINGERPRINT AMERICA, https://fingerprintamerica.com/about/ [https://perma.cc.R7YF-3J3D] (tracing the first fingerprint repositories to the early twentieth century).

42. *See infra* notes 43–52 (discussing the development of new electronic databases, beginning in the 1970s, that gave prosecutors increasingly greater access to information about defendants).

43. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, USE AND MANAGEMENT OF CRIMINAL HISTORY RECORD INFORMATION: A COMPREHENSIVE REPORT, 2001 UPDATE 27 (2001), http:// www.ojp.usdoj.gov/bjs/pub/pdf/umchri01.pdf [https://perma.cc/95GN-QTFW].

44. *See Central Segment*, NCIC 2000 (Fed. Bureau of Investigation, D.C.) Apr.–May 1996, http://permanent.access.gpo.gov/lps3213/2kv1n3.htm [https://perma.cc/67DT-ECMG] (describing how the Interstate Identification Index was operationalized); U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-85-4, OBSERVATIONS ON THE FBI'S INTERSTATE IDENTIFICATION INDEX 2–3 (1984), http://archive.gao.gov/d6t1/125400.pdf [https://perma.cc/CRF3-73J7]; *National Crime Information Center (NCIC)*, FED'N OF AM. SCIENTISTS (Jun. 2, 2008), http://www.fas.org/irp/agency/doj/fbi/is/ncic.htm [https://perma.cc/6SST-75G7].

45. Brady Handgun Violence Prevention Act, 18 U.S.C. § 925A, Pub. L. 103-159, Title I (1993).

46. *See National Criminal History Improvement Program*, BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, https://www.bjs.gov/index.cfm?ty=tp&tid=47 [https://perma.cc/5AQJ-Y6DE]; *National Criminal History Improvement Program*, R.I. PUB. SAFETY GRANT ADMIN. OFFICE, http://psga.ri.gov/grants/nchip.php [https://perma.cc/VMG8-KKFE].

47. E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913–14 (codified as amended, 44 U.S.C. § 3501 (2000)).

48. *Id.*

juvenile offenses, once considered confidential, are included in the FBI's Interstate Identification Index.[49]

Many of these laws were enacted in response to public or governmental outcry over a particular catastrophic event. The Brady Act, passed after the attempted assassination of President Reagan (and murder of James Brady, Reagan's press secretary) by a man with an extensive criminal history,[50] played a major role in establishing a national criminal background check service.[51] The 9/11 attacks were another notable catalyst for data collection, as the federal government began pouring money into state and local agencies for activities such as intelligence gathering, surveillance, and data collection of "suspicious" populations.[52] Courts and lawmakers that could have served as a check on law enforcement officials instead have increasingly empowered law enforcement to engage in questionable surveillance activities.[53] As

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49. *See* Includable Offenses, 28 C.F.R. § 20.32 (2004). On July 15, 1992, the Department of Justice amended this section to include juvenile offenses. *See* Authorization of Inclusion of Juvenile Records in the FBI Criminal History Information System, 57 Fed. Reg. 31,315 (Jul. 15, 1992) (codified at 28 C.F.R. § 20.32(b)). The amended regulation requests submission of "serious and/or significant adult and juvenile offenses." 28 C.F.R. § 20.32(a).

50. Brady Handgun Violence Prevention Act, 18 U.S.C. § 925A, Pub. L. 103-159, Title I (1993); *see also Jim and Sarah Brady*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, http://www.bradycampaign.org/jim-and-sarah-brady [https://perma.cc/642S-JV3A].

51. *See* National Instant Criminal Background Check System Regulation, 63 Fed. Reg. 58,303 (Oct. 30, 1998) (codified at 28 C.F.R. pt. 25) (implementing the NICS pursuant to the Brady Act).

52. *E.g.*, Press Release, U.S. Dep't of Homeland Sec., DHS Announces More Than $1.3 Billion in Fiscal Year (FY) 2012 Preparedness Grant Awards (June 29, 2012), http://www.dhs.gov/news/2012/06/29/dhs-announces-more-13-billion-fiscal-year-fy-2012-preparedness-grant-awards [https://perma.cc/2QV5-TMCC]; Press Release, U.S. Dep't of Homeland Sec., DHS Announces More Than $2.1 Billion in Preparedness Grants (Aug. 23, 2011), http://www.dhs.gov/news/2011/08/23/dhs-announces-more-21-billion-preparedness-grants [https://perma.cc/QG5N-QL8T] (announcing the allocation of "approximately $35 billion" in grants for the years spanning 2002–2011). One example of this was the Los Angeles Police Departments' efforts to collect intelligence on the local Muslim community. *See* Michael P. Downing, *Statement Before the Committee on Homeland Security's* [sic] *and Governmental Affairs United States Senate*, L.A. POLICE DEP'T (Oct. 30, 2007), http://assets.lapdonline.org/assets/pdf/Michael%20DowningTestimonyfortheU.S.Senate-Final.PDF [https://perma.cc/AV77-TNAE]; Richard Winton et al., *LAPD Defends Muslim Mapping Effort*, L.A. TIMES (Nov. 10, 2007), http://www.latimes.com/local/la-me-lapd10nov10-story.html [https://perma.cc/48WF-DPKH].

53. *See, e.g.*, Khaled A. Beydoun, *Boxed In: Reclassification of Arab Americans on the U.S. Census as Progress or Peril?*, 47 LOY. U. CHI. L.J. 693, 699–701 (2016) (discussing enhanced governmental surveillance of Middle Eastern, North African, and Muslim communities after 9/11); Nuzhat Chowdhury, Note, *I, Spy (but Only on You):* Raza v. City of New York*, the Civil Rights Disaster of Religious & Ethnic-Based Surveillance, and the National Security Excuse*, 46 COLUM. HUM. RTS. L. REV. 278, 279 (2015) (lamenting the increased deference that lawmakers have afforded law enforcement agents surveilling Muslim populations after 9/11); Carlos Torres et al., *Indiscriminate Power: Racial Profiling and Surveillance Since 9/11*, 18 U. PA. J.L. & SOC. CHANGE 283, 293–96

technology has advanced and the government's thirst for obtaining and recording personal information remains unsated, both state and federal government agencies have vastly expanded their collection and reporting of criminal history data.[54]

Now, when a defendant is charged with a crime, a prosecutor need only enter the defendant's name and date of birth into a statewide or national database, which will produce every court case in which the person has ever been named as a defendant, with the possible exception of very minor municipal offenses.[55] If the defendant was arrested and fingerprinted prior to charging, those fingerprints are run through a registry that produces every prior arrest attributable to the same fingerprints.[56] The government can access this information regardless of whether the arrest or charge was dismissed and, in some jurisdictions, even if the charges against the defendant were sealed or expunged.[57] State and national databases also track civil contacts with the judicial system, including lawsuits, divorce filings, immigration violations, and child custody disputes.[58] Before even making a charging decision in most cases, the government has at its disposal an entire lifetime of the defendant's encounters with the legal

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(2015) (detailing the FBI and NYPD's largely-unchecked "blatant . . . racial profiling" of Middle Easterners after 9/11); Adam Goldman & Matt Apuzzo, *NYPD: Muslim Spying Led to No Leads, Terror Cases*, ASSOC. PRESS (Aug. 21, 2012), https://www.ap.org/ap-in-the-news/2012/nypd-muslim-spying-led-to-no-leads-terror-cases [https://perma.cc/FNR9-WHVQ].

54. *See* James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 178 (2008); Erin Murphy, *Databases, Doctrine, and Constitutional Criminal Procedure*, 37 FORDHAM URB. L.J. 803, 804–09 (2010) (discussing the rapid expansion of criminal justice databases beginning approximately thirty years ago); Joy Radice, *The Reintegrative State*, 66 EMORY L.J. 1315, 1319 (2017) (noting that United States' criminal history databases now hold more than one-hundred million records).

55. *See, e.g.*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS (Dec. 2015), https://www.ncjrs.gov/pdffiles1/bjs/grants/249799.pdf [https://perma.cc/V4NU-F5Y8]; *Criminal History Records Search*, N.Y. STATE UNIFIED COURT SYS. http://www.courts.state.ny.us/apps/chrs [https://perma.cc/LN2G-KNCZ]; *CourtVIEW*, http://www.ashlandcountycpcourt.org [https://perma.cc/SEC5-G3YW] (database for Ashland County, Ohio, Common Pleas Court).

56. *See Privacy Impact Assessment Integrated Automated Fingerprint Identification System National Security Enhancements*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/hq/cjisd/iafis.htm [https://perma.cc/LPB3-WUP6]. The Integrated Automated Fingerprint Identification System (IAFIS) is a national fingerprint and criminal history system that contains information submitted by local, state, and federal law enforcement agencies. *Id.*; BUREAU OF JUSTICE STATISTICS, *supra* note 55.

57. *E.g.*, COLO. REV. STAT. § 24-72-702(e) (2017) (permitting a prosecutor to request information about sealed criminal records); MINN. STAT. § 609A.03, subd. 7(b)(3) (2017) ("Upon request by law enforcement, prosecution, or corrections authorities, an agency or jurisdiction subject to an expungement order shall inform the requester of the existence of a sealed record and of the right to obtain access to it . . . .").

58. *See supra* notes 30, 55.

system and can begin strategizing about which of that information it wishes to introduce at trial.[59]

B. Provisions Allowing Prosecutors to Admit Defendants' Prior Convictions

Many defendants have prior convictions.[60] A 2006 study of the seventy-five largest counties in the country revealed that 43% of defendants facing felony charges already had felony convictions.[61] Numerous empiricists have concluded that jurors who hear about a defendant's prior convictions are more likely to convict the defendant and use the information for the (ostensibly impermissible) purpose of inferring that the defendant committed the charged crime.[62] At least one older study found that admitting evidence of a defendant's prior conviction in a jury trial increased the rate of conviction for the charged offense by 27%.[63] Simply put, when jurors hear about a defendant's prior conviction, they are less likely to find the defendant credible. To exacerbate the problem, defendants with prior convictions are also significantly less likely to testify at trial if their convictions will be admitted against them.[64] This is a further boon to the government, because statistics show that many jurors

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59. Although not the subject of this piece, information about the defendant's prior history also has enormous effect on, *inter alia*, what the defendant is charged with and what plea offers the government might extend. *See, e.g.*, Ouziel, *supra* note 8, at 702–03.

60. *See* Thomas H. Cohen & Tracey Kyckelhahn, *Felony Defendants in Large Urban Counties, 2006*, BUREAU OF JUST STAT.: BULL. 1–2 (July 15, 2010), https://www.bjs.gov/content/pub/pdf/fdluc06.pdf [https://perma.cc/5ZMW-URLL].

61. *Id.*

62. *E.g.*, Sally Lloyd-Bostock, *The Effects on Juries of Hearing About the Defendant's Previous Criminal Record: A Simulation Study*, 2000 CRIM. L. REV. 734, 738 (2000); Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 3, 26 (1997). *But see* Larry Laudan & Ronald J. Allen, *The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process*, 101 J. CRIM. L. & CRIMINOLOGY 493 (2013) (arguing that the hypothesis that prior convictions affect a jury's verdict is not proven).

63. *See* John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 487 n.39 (2008) (citing HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY (1966)).

64. *See* Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 836–37 (2016) [hereinafter Roberts, *Reclaiming the Importance of the Defendant's Testimony*] (citing Blume, *supra* note 63, at 491) (citing a study showing that defendants with prior convictions frequently waive their right to testify at trial because they fear being impeached with their prior conviction, and that informing jurors of the prior conviction increases the likelihood of conviction at trial).

expect defendants to tell their side of the story and assume defendants who do not testify probably are not innocent.[65]

Scholars and courts since at least the 1940s have recognized that admission of prior convictions is deeply damaging to a defendant's chances of being found not guilty at trial.[66] Nonetheless, despite the damning effect of a prior conviction on the defendant's chance for a fair trial, our evidentiary doctrines persist in providing prosecutors a wide array of means to admit just that.[67] In federal court, Federal Rule of Evidence 609 governs impeachment by prior conviction, and allows the government to impeach criminal defendants with two types of convictions.[68] The first are convictions involving dishonesty. Under Federal Rule of Evidence 609(a)(2), any conviction involving a "dishonest act or false statement" must be admitted for impeachment purposes if the defendant testifies.[69] This rule applies to convictions for both felonies and misdemeanors, and requires admission without any further assessment of probative value or prejudice to the defendant.[70]

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65. *See generally* Roberts, *Reclaiming the Importance of the Defendant's Testimony*, *supra* note 64, at 838–39 (citing research suggesting that jurors tend to assume the guilt of defendants based on destructive and often racialized stereotypes of criminality, but are less likely to rely on stereotypes if the defendant personally testifies); Andrew E. Taslitz, *Trying Not to Be Like Sisyphus: Can Defense Counsel Overcome Pervasive Status Quo Bias in the Criminal Justice System?*, 45 TEX. TECH. L. REV. 315, 358 (2012) (utilizing empirical evidence to prove the point that "despite the presumption of innocence, most jurors believe that those accused of crime are probably guilty, ought to testify if they are not, and bear the burden of proving their innocence").

66. *E.g.*, United States v. Gilliland, 586 F.2d 1384, 1389 (10th Cir. 1978) ("[A]n obvious truth is that once prior convictions are introduced the trial is, for all practical purposes, completed and the guilty outcome follows as a mere formality."); United States v. Garber, 471 F.2d 212, 215 (5th Cir. 1972) (noting "a growing number of judges and commentators" criticizing the practice of permitting prior conviction evidence to impeach defendants); Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967) (expressing concern that defendants with prior convictions may "not testify out of fear of being prejudiced because of impeachment . . . ."); Robert D. Dodson, *What Went Wrong with FRE Rule 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 DRAKE L. REV. 1, 21–22 (1999); Richard Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637, 688 (1991) (arguing for abrogation of Rule 609); Kalven & Zeisel, *supra* note 63, at 161 (noting that when defendant has a record of prior convictions, acquittal by jury is far less likely than when defendant has no record of prior crimes); Mason Ladd, *Credibility Tests—Current Trends*, 89 U. PA. L. REV. 166, 186 (1940) (positing that a defendant impeached by a prior conviction may be "overwhelmed with prejudice").

67. The Federal Rules of Evidence were first proposed in 1972 and enacted in 1975. *See* FED. R. EVID. 101, 1101. At that time, courts had far less experience with or access to extensive national databases of defendants' prior misdeeds, and the promulgators of the Federal Rules may not have envisioned how frequently prosecutors would have access to and attempt to use evidence of past misconduct.

68. FED. R. EVID. 609.

69. *Id.* at (a)(2).

70. *Id.*

Courts take an expansive view of the definition of "dishonest act": in some jurisdictions, convictions for theft or shoplifting are per se crimes of dishonesty regardless of the underlying facts.[71] Others have interpreted the phrase "dishonest act" to include, among other things, burglary[72] and distribution of controlled substances.[73]

The second class of prior convictions admissible under federal law are felonies punishable by at least one year in prison.[74] Felony convictions within the last ten years (measured by date of conviction or release from custody, whichever is later), must be admitted as long as the court finds that the probative value of the conviction outweighs the danger of unfair prejudice to the defendant.[75] If more than ten years have passed since the defendant's conviction or release from custody, courts should admit the conviction if the probative value "substantially" outweighs the prejudicial effect.[76] Here too, courts consistently take an expansive view of the kinds of convictions that have probative value: federal courts have found that the government properly "impeached" defendants accused of murder with prior murder convictions, bank robbery with prior bank robbery convictions, and possession of firearms with convictions for the same crime.[77]

Every state except one allows the government to impeach defendants with evidence of their prior convictions,[78] and many employ rules similar or identical to Federal Rule 609.[79] Some states take an even more generous approach to admitting prior convictions. In Colorado, for example, any felony conviction, regardless of the age of conviction or type of offense, is admissible for impeachment purposes if the defendant testifies.[80] In

71. *E.g.*, State v. Ray, 116 Wash. 2d 531, 545, 806 P.2d 1220, 1228 (1991) (overruling prior, narrower definition of crime of dishonesty propounded in *State v. Burton*, 101 Wash. 2d 1, 676 P.2d 975 (1984)).

72. United States v. Brown, 603 F.2d 1022, 1029 (1st Cir. 1979) (concluding that a burglary conviction has "a definite bearing on honesty which is directly related to credibility").

73. United States v. Ortiz, 553 F.2d 782, 784 (2d Cir. 1977) (holding that the trial court properly recognized the "secrecy and dissembling" involved in trafficking narcotics).

74. FED. R. EVID. 609(a)(1)(B).

75. *Id.*

76. *Id.* at 609(b).

77. *See* Edward E. Gainor, Note, *Character Evidence by Any Other Name . . . : A Proposal to Limit Impeachment by Prior Conviction Under Rule 609*, 58 GEO. WASH. L. REV. 762, 779–80 (1990) (citing numerous cases for these points).

78. The only state that does not allow prior convictions to be used for impeachment of defendants under any circumstances is Montana. *See* MONT. R. EVID. 609.

79. *E.g.*, ME. R. EVID. 609; NEB. REV. STAT. § 27-609; N.M.R. EVID. 11-609; *see also* Blume, *supra* note 63, at 491; Roberts, *Conviction by Prior Impeachment*, *supra* note 16, at 1980.

80. COLO. REV. STAT. § 13-90-101 (2017).

California, the government may impeach a testifying defendant with any felony conviction involving "moral turpitude," regardless of whether it was a crime of dishonesty.[81]

Even when courts are required to perform a balancing test before admitting a defendant's conviction, that test frequently balances out in favor of admitting the prior conviction. Professor Anna Roberts has noted that, though in earlier decades courts tended to permit prior convictions only after carefully weighing their probative value against a possible chilling effect on the defendant's testimony, today's courts are far more likely to admit the prior conviction, with little or no meaningful analysis of how it might prejudice the defendant's case or detract from the defendant's ability to testify.[82] Other studies and commentators support the conclusion that, for the majority of judges, the default rule is to allow the government to admit a defendant's prior conviction.[83] One explanation for this is that, despite the presumption of innocence, most players in the criminal system—judges included—start with a working hypothesis that the defendant is guilty, and, intentionally or not, are likely to interpret information (such as a prior conviction) in a way that supports this initial hypothesis.[84]

The result of the judiciary's over-reliance on Rule 609 is a Hobson's choice for the defendant. The defendant can testify and allow the jury to hear about the prior conviction, in which case the jury is more likely to convict based on their belief that the defendant is a bad person.[85] Alternatively, the defendant can decline to testify and prevent the jury from learning of the prior conviction, in which case the jury is more likely to convict based on their belief that the defendant would testify if truly innocent.[86] Either way, the jury is less likely to treat the defendant as a

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81. People v. Edwards, 306 P.3d 1049, 1101 (Cal. 2013).

82. *See* Roberts, *Reclaiming the Importance of the Defendant's Testimony*, *supra* note 64, at 837–38 (citing, *inter alia*, United States v. Alexander, 48 F.3d 1477, 1489 (9th Cir. 1995); United States v. Nururdin, 8 F.3d 1187, 1192 (7th Cir. 1993); United States v. Sanders, 964 F.2d 295, 297–98 (4th Cir. 1992)).

83. *See* United States v. Pettiford, 238 F.R.D. 33, 42 (D.D.C. 2006) (noting "the general trend towards admissibility" of prior convictions). KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 42 at 95 (7th ed. 2013) (noting that most judges side with prosecutors in permitting admission of prior convictions); Blume, *supra* note 63, at 484, 490–91 (discussing how judges' balancing tests routinely play out in favor of the government admitting the prior conviction).

84. *E.g.*, Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 314 (2006).

85. Blume, *supra* note 63, at 487 n.39.

86. Taslitz, *supra* note 65, at 358. Though not the subject of this paper, other scholars have done excellent work pointing out the damage that silencing defendants does in contexts beyond the question of guilt or innocence. *See, e.g.*, Natapoff, *supra* note 1.

presumptively innocent person, and more likely to decide any credibility contest in favor of the government.

C. Rules Allowing Prosecutors to Admit Other Acts as Evidence

Even if a defendant does not testify at trial, the defendant's prior convictions—or other "acts" that do not result in conviction—may be admissible as proof that the defendant is the person who committed the charged crime. Exposing jurors to other acts evidence "greatly increases" the likelihood that the jury will convict the defendant of the charged crime.[87] Nonetheless, courts admit this evidence on a regular basis, primarily pursuant to Rule of Evidence 404(b).[88]

Federal Rule of Evidence 404(b), upon which many state rules are also patterned,[89] provides in relevant part:

> (b) Crimes, Wrongs, or Other Acts.
>
> (1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> (2) Permitted Uses; Notice in a Criminal Case. [Evidence of a crime, wrong, or other act] may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:
>
> (A) Provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

87. *See* Erin R. Collins, *The Evidentiary Rules of Engagement in the War Against Domestic Violence*, 90 N.Y.U. L. REV. 397, 444 (2015) (citing Edward J. Imwinkelried, *The Dispute over the Doctrine of Chances*, 7 CRIM. JUSTICE 16, 21 (1992)).

88. FED. R. EVID. 404(b).

89. *See, e.g.*, COLO. R. EVID. 404(b) (adopting an identical or very similar version of Federal Rule of Evidence 404(b)); ILL. ST. EVID. R. 404(b); TEX. EVID. R. 404(b) (same).

> (B) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice.[90]

In theory, Rule 404(b)(1), commonly referred to as the prohibition on use of "propensity" evidence, protects the defendant's right to a fair trial by preventing the government from introducing evidence solely for the sake of showing that the defendant is a person of bad character who acted in conformity with this character by committing the charged offense.[91] However, the permitted uses of other acts evidence identified in 404(b)(2), and the expansive way courts have interpreted 404(b)(2), have given the government ample means to introduce evidence of defendants' histories of bad acts.[92]

Rule 404(b)(2) allows the government broad leeway to introduce any other act by the defendant—regardless of whether it resulted in conviction, or whether it was a crime at all—to prove a laundry list of damning allegations about a defendant, including that the defendant had the motive, intent, or knowledge to commit the charged crime; that the defendant prepared or planned or had an opportunity to commit the crime; that the crime was not a mistake or accident; and that the defendant is the person who committed the crime.[93] The Rule's text contains no standard for assessing whether the evidence should be admitted, and no burden on the moving party to prove why the evidence is relevant or reliable.[94]

In the absence of any textual standards, courts have generally taken lax and inconsistent approaches to the standard that must be met for admission of this evidence. Some jurisdictions place a burden on the moving party to establish that the other acts evidence is admissible for a non-propensity purpose, but do not specify what that burden is.[95] Others allow the movant to introduce other acts evidence as long as the jury can

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90. FED. R. EVID. 404(b).

91. *Id.* at (b)(1); *see* United States v. Gomez, 763 F.3d 845, 852 (7th Cir. 2014).

92. *See* Daniel D. Blinka, *Character, Liberalism, and the Protean Culture of Evidence Law*, 37 SEATTLE U. L. REV. 87. 110–12 (2013) (commenting on the ease with which a creative prosecutor can introduce character evidence under the guise of 404(b)); Imwinkelried, *supra* note 13, at 721 (stating that prosecutors use other acts evidence with "great frequency" because it is so powerful in persuading the jury to convict); David A. Sonenshein, *The Misuse of Rule 404(b) on the Issue of Intent in the Federal Courts*, 45 CREIGHTON L. REV. 215, 219 (2011) (discussing how in the past two decades, federal courts have expanded their admission of other acts evidence, and admission is now the default rule).

93. FED. R. EVID. 404(b)(2).

94. *Id.*

95. *E.g.*, United States v. Hall, 858 F.3d 254, 260 (4th Cir. 2017) (holding that the government "must establish that evidence of a defendant's prior bad acts is admissible for a proper, non-propensity purpose").

conclude by a preponderance of the evidence that the other act occurred, but do not require judges to make the preponderance determination prior to trial.[96] The U.S. Supreme Court has rejected even the easily-satisfied preponderance standard; instead, a court may allow other acts evidence at trial as long as there is "sufficient evidence to support a finding by the jury that the defendant committed the similar act."[97]

Although the rule allows either party to move for admission of other acts evidence, it is overwhelmingly employed by the government, the party with easy access to information about the defendant's prior history.[98] Under the guise of Rule 404(b)(2), courts have allowed prosecutors to introduce, for example, evidence of a prior murder to prove that the defendant had a motive to commit the charged murder,[99] and evidence that the defendant previously sold cocaine to prove that he intended to sell the charged cocaine.[100] In practice, such uses are not meaningfully different from the propensity evidence that Rule 404(b)(1) purportedly prohibits.[101] The Seventh Circuit has come close to conceding this, holding that evidence cannot be excluded even though it may be used to infer propensity, as long as it is also admissible for a non-propensity purpose.[102]

Although the text of Rule 404(b)(2) is expansive, it is not exhaustive. Courts have interpreted the "such as" language in the Rule[103] to admit other acts evidence for purposes even beyond the nine enumerated in the Rule itself, including to rebut a claim of self-defense or explain a complainant's state of mind.[104] Prosecutors have also relied on Rule

96. *E.g.*, *Gomez*, 763 F.3d at 853–54.

97. Huddleston v. United States, 485 U.S. 681, 685 (1988).

98. *See* FED. R. EVID. 404 (comment to 1991 amendment) ("[T]he overwhelming number of cases [addressing 404(b)(2) evidence] involve introduction of that evidence by the prosecution.").

99. *E.g.*, State v. Badgett, 644 S.E.2d 206, 211–12 (N.C. 2007).

100. *E.g.*, United States v. Perkins, 548 F.3d 510, 514–15 (7th Cir. 2008) (admitting three prior cocaine possession or delivery convictions to prove knowledge and intent in charged case); United States v. Hearn, 534 F.3d 706, 712–13 (7th Cir. 2008); United States v. Hurn, 496 F.3d 784, 787–88 (7th Cir. 2007); United States v. Best, 250 F.3d 1084, 1091–93 (7th Cir. 2001); *see also* United States v. Miller, 673 F.3d 688, 698–99 (7th Cir. 2012) (holding that trial court erred in allowing government to admit evidence of a defendant's prior narcotics sales in a prosecution for selling narcotics, but acknowledging that the court so routinely allowed such evidence to be admitted that it "may have come to seem almost automatic").

101. FED. R. EVID. 404(b)(1); *see also* State v. Melcher, 678 A.2d 146, 152 (N.H. 1996) (Horton, J., dissenting) (prior bad acts evidence admitted to demonstrate the "relationship between the parties" was "merely a synonym for propensity").

102. United States v. Ferrell, 816 F.3d 433, 444 (7th Cir. 2015).

103. *See* FED. R. EVID. 404(b)(2) (evidence of a crime, wrong, or other act "may be admissible for another purpose, such as" proving motive, intent, etc.).

104. *E.g.*, State v. Labrum, 2014 UT App 5, ¶ 9, 318 P.3d 1151.

404(b) to admit evidence of actions that are not crimes at all—for instance, the Rule has been used to show a defendant had a strained relationship with his family,[105] wrote articles about subjects related to the charged offense,[106] was in an earlier altercation with a government witness in the charged case,[107] and was a gang member with the nickname "Mafioso."[108]

D. Case Law Allowing Admission of "Res Gestae" or "Inextricably Intertwined" Evidence

Res gestae, a Latin phrase meaning "things done," is used in law to denote, broadly, the events or circumstances pertaining to a particular case.[109] Courts have defined res gestae evidence as, *inter alia*, "[e]vidence of other offenses or acts that is . . . part of the criminal episode or transaction with which the defendant is charged," used to "provide the fact-finder with a full and complete understanding of the events surrounding the crime and the context in which the charged crime occurred."[110] Other courts define res gestae evidence as that which is "inextricably intertwined with evidence regarding the charged offense,"[111] leading some courts and scholars to refer to the doctrine as the "inextricably intertwined" doctrine.[112] The res gestae doctrine allows the government to introduce otherwise inadmissible evidence on grounds that it is needed to give "context in which a charged crime occurred."[113]

Although the concept of res gestae evidence is not new,[114] its expansive use is a more recent phenomenon.[115] As far back as 1940, Professor Wigmore, in his seminal treatise *On Evidence*, condemned the res gestae

105. United States v. Fulmer, 108 F.3d 1486 (1st Cir. 1997).

106. United States v. Tokars, 95 F.3d 1520 (11th Cir. 1996).

107. United States v. Bein, 728 F.2d 107 (2d Cir. 1984).

108. United States v. McKay, 431 F.3d 1085 (8th Cir. 2005).

109. *Res Gestae*, BLACK'S LAW DICTIONARY 1501–02 (10th ed. 2014).

110. People v. Quintana, 882 P.2d 1366, 1373 (Colo. 1994).

111. United States v. Weeks, 716 F.2d 830, 832 (11th Cir. 1983) (citing United States v. Killian, 639 F.2d 492, 494 (5th Cir. 1981)); *see also* Imwinkelried, *supra* note 13, at 726.

112. Imwinkelried, *supra* note 13, at 726, 728; *see also, e.g.*, State v. Riddley, 776 N.W.2d 419, 425 (Minn. 2009) (referring to res gestae evidence as "immediate-episode evidence").

113. *Quintana*, 882 P.2d at 1373; *see also* Ann England & H. Patrick Furman, *The Expanding Use of the* Res Gestae *Doctrine*, 38 COLO. LAW. 35, 35–36 (2009) (discussing the history and use of the res gestae doctrine).

114. The U.S. Supreme Court first recognized the res gestae doctrine in *Leeds v. Marine Ins. Co.*, 15 U.S. (2 Wheat.) 380 (1817).

115. *See* England & Furman, *supra* note 113, at 42 (discussing how Colorado state and federal courts have "significantly broadened the applicability of the [res gestae] doctrine"); Imwinkelried, *supra* note 13, at 726 (criticizing the expanded use of the doctrine in recent years).

doctrine as "positively harmful," in part because its imprecise precise definition invites confusion from the courts and abuse by those seeking to admit collateral evidence to prove the defendant's guilt.[116] Seventy years later, every federal circuit court recognizes some version of the doctrine,[117] and several states have enshrined it by statute or rule of evidence.[118]

When evidence is deemed admissible as res gestae, it is not subject to the restrictions of Rule 404(b), because it is theoretically so intertwined with the charged offense that it cannot be deemed other acts evidence.[119] In practice, however, it has been found to encompass acts that are not at all intertwined with the charged case. Recent courts have used the res gestae or inextricably intertwined doctrine to admit evidence in a murder case that the defendant had previously threatened to murder other people unrelated to the charged offense[120]; in a perjury trial, that the defendant attempted to convince an unrelated witness to lie for him at a prior trial[121]; and in a possession of controlled substance case, that the defendant had an outstanding warrant for an unrelated offense.[122] Rather than serve as a narrow means of admitting evidence closely related to the charged case, the res gestae doctrine has too often been employed as an end-run around what little protections Rule 404(b) may provide to defendants.[123]

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116. JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 1768 (3d ed. 1940); *see also* United States v. Matot, 146 F.2d 197, 198 (2d Cir. 1944) (stating that res gestae should be "denied any place whatever in legal terminology").

117. *See* United States v. Robinson, 702 F.3d 22, 36–37 (2d Cir. 2012); United States v. Ford, 613 F.3d 1263, 1267 (10th Cir. 2010); United States v. Concepcion, 316 F. App'x 929, 932 (11th Cir. 2009) (per curiam); United States v. Gutierrez-Castro, 341 F. App'x 299, 300 (9th Cir. 2009); United States v. Aldridge, 561 F.3d 759, 766 (8th Cir. 2009); United States v. Conner, 583 F.3d 1011, 1018–19 (7th Cir. 2009); United States v. Watkins, 591 F.3d 780, 784–85 (5th Cir. 2009); United States v. Rodriguez-Berrios, 573 F.3d 55, 64 (1st Cir. 2009); Wilson v. Vaughn, 533 F.3d 208, 217 (3d Cir. 2008); United States v. Hardy, 228 F.3d 745, 748 (6th Cir. 2000); United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980). *But see* United States v. Bowie, 232 F.3d 923, 927–29 (D.C. Cir. 2000) (expressing concerns with application of inextricably-intertwined doctrine).

118. *See* KY. R. EVID. 404(b)(2) (2007); LA. CODE EVID. ANN. 404(B) (2010); NEV. REV. STAT. § 48.035(3) (2007).

119. *See* United States v. Record, 873 F.2d 1363, 1372 n.5 (10th Cir. 1989) (citing United States v. Orr, 864 F.2d 1505, 1510 (10th Cir. 1988)); Imwinkelried, *supra* note 13, at 726, 728.

120. People v. Quintana, 882 P.2d 1366, 1373–75 (Colo. 1994).

121. United States v. Walker, 148 F.3d 518 (5th Cir. 1998).

122. People v. Asberry, 172 P.3d 927 (Colo. App. 2007).

123. *See* United States v. Bowie, 232 F.3d 923, 927–29 (D.C. Cir. 2000) (criticizing federal courts' expansive use of the inextricably intertwined doctrine and suggesting that such broad use serves little purpose other than to give the government an impermissible avenue around the notice requirements of Rule 404(b)).

The variety of evidentiary doctrines enabling the government to introduce a defendant's criminal history at trial—as well as the databases tracking and cataloging a defendant's every encounter with the law—are incredibly powerful tools for the government to cast doubt on the defendant's credibility and theory of defense. In contrast, a defendant's attempts to contest an officer's credibility are severely hampered by the government's failure to record and collect information relevant to an officer's credibility, as well as the law's reluctance to provide defendants access to the information even when it does exist.

II. DEFENDANTS' LACK OF ACCESS TO, AND ABILITY TO USE, POLICE OFFICERS' HISTORY

While lawmakers have granted prosecutors plentiful means by which to access and utilize evidence of a defendant's past conduct, they have conversely gone to great lengths to prevent defense counsel from obtaining or using information that could damage the credibility of police officer-accusers. Consider the cases discussed in the introduction to this Article, where the defendant was accused of resisting arrest, assaulting a police officer, possessing narcotics, or any number of other allegations in which the police officer's credibility is the crux of the case against the defendant.[124] To cast doubt on the officer's credibility, defense counsel will likely want to obtain information not that different from what the government already knows about the defendant—whether the police officer has a history of misconduct that could be relevant to the officer's credibility at trial. But this kind of information is, in many jurisdictions, either extremely difficult or impossible for defense attorneys to obtain and use against officers.[125]

The legal barriers to defense counsel casting doubt on a police officers' credibility manifest themselves in a variety of ways, which this Article breaks down into three essential components: existence, access, and use. An initial obstacle to utilizing evidence of police misconduct is that the

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124. *See* Fallon v. State, 221 P.3d 1016, 1017 (Alaska Ct. App. 2010); People v. Minniweather, 703 N.E.2d 912, 913 (Ill. Ct. App. 1998); Foster v. United States, 136 A.3d 330, 331–32 (D.C. Cir. 2016).

125. *See infra* section II.B; *see, e.g.*, Mike Hayes & Kendall Taggart, *Busted: The NYPD's Secret Files*, BUZZFEED NEWS (Mar. 5, 2018, 2:58 AM), https://www.buzzfeed.com/kendalltaggart/secret-nypd-files-hundreds-of-officers-committed-serious?utm_term=.qumQJgADK#.fjrOLAKaz [https://perma.cc/A5C3-82QK] (discussing NYPD officers who remain on the police force after committing serious misconduct, noting that "the people they arrest have little way to find out about the officer's record. So they are forced to make life-changing decisions—such as whether to fight their charges in court or take a guilty plea—without knowing, for example, if the officer who arrested them is a convicted liar, information that a jury might find directly relevant").

evidence—even if the officer has in fact engaged in misconduct—may not exist, or whatever records do exist may not accurately reflect what happened. In many jurisdictions, police departments are solely responsible for both creating records of potential misconduct by their own officers and reviewing misconduct allegations to determine whether they should be sustained.[126] Given that individual officers and police departments as a whole have an incentive not to admit their own misconduct, these records routinely either are not made or, if made and reviewed, are resolved in favor of the officers, and thus do not accurately reflect what actually occurred.[127]

Even when the records exist, many jurisdictions make accessing and using police records either difficult or impossible for defense attorneys in criminal cases.[128] If defense counsel has no way of knowing whether the records exist, and cannot access or use them when they do exist, counsel cannot uncover information critical to the police officer's credibility and cannot effectively overcome the jury's presumption that the officer is a credible witness.

A. Existence of Police Misconduct Records: An Informational Asymmetry

The drastic contrast between the government's ability to access and utilize a defendant's history, and the defendant's inability to do the same with police officer witnesses, arises in part from what may best be described as an informational asymmetry.[129] I have written in the past about how our legal system is imbued with undue deference to police officers.[130] This deference routinely rears its ugly head in the context of police misconduct records. For purposes of this Article, police misconduct records include, but are not limited to, reports authored by police officers; civilian complaints of misconduct by police officers; documented investigations into possible misconduct; and findings of misconduct by administrative, judicial, or prosecutorial bodies.[131]

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126. *See infra* section II.A.

127. *Id.*

128. *See infra* section II.B.

129. Thanks to Eve Primus for this helpful phraseology.

130. *See* Moran, *supra* note 18.

131. *See, e.g.*, Abel, *supra* note 8, at 745 (defining police personnel records as files that contain, *inter alia*, "internal affairs reports, disciplinary write-ups, and performance evaluations, documenting a range of information that defendants can use to their advantage at trial").

The government's zeal in enacting regulations for collecting and storing data about defendants has not carried over to the reporting, recording, or storage of police misconduct data. No national databases catalog police officers who have engaged in misconduct.[132] Nor can defense attorneys type an officer's name into a registry and find out whether the officer has previously been disciplined for misconduct.[133] The federal government has not promulgated uniform guidelines for recordkeeping pertaining to police misconduct,[134] and in most states, decisions about what records to keep and how to collect and memorialize data are left to each individual police department.[135]

Given the lack of external oversight, it should be no surprise that recordkeeping pertaining to police misconduct is sporadic and variable among jurisdictions. After a slew of tragic police shootings of people of color in recent years, reporters and scholars alike bemoaned the fact that it is impossible to say with certainty how many people police in the United States kill each year, because police departments are not required to report even that minimal amount of data.[136] But the data problem extends far beyond officer-involved shooting deaths. As Professor Rachel Harmon has argued, the lack of consistent data and recordkeeping in police departments presents significant concerns on many levels, one of which is tracking police officers who commit misconduct.[137] Many police

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132. The National Decertification Index (NDI), funded by a United States Department of Justice grant, does serve as "a national registry of certificate or license revocation actions relating to officer misconduct." *See About NDI*, INT'L ASS'N OF DIRS. OF LAW ENF'T STANDARDS & TRAINING, https://www.iadlest.org/Projects/NDI20.aspx [https://perma.cc/YS9L-XM4M]. The NDI, however, is limited to state government agencies that self-report decertification actions taken against police officers, and access to the NDI by non-law enforcement personnel will be granted only in "cases of legitimate need." *See Request NDI Access*, INT'L ASS'N OF DIRS. OF LAW ENF'T STANDARDS & TRAINING, https://www.iadlest.org/Projects/NDI20/NonPOSTRequestAccess.aspx [https://perma.cc/QUJ5-Y837].

133. *See Request NDI Access*, *supra* note 132 (limiting its database to certification and deregistration actions rather than police misconduct more generally and requiring people other than law enforcement to identify a "legitimate need" for access to NDI).

134. *See* Rachel Harmon, *Why Do We (Still) Lack Data on Policing?*, 96 MARQ. L. REV. 1119, 1134–45 (2013) (discussing limited and largely ineffectual federal government efforts to obtain policing data).

135. *See id.* at 1133 (noting that there is very little uniformity among states regarding what types of data police departments must collect).

136. Wesley Lowery, *How Many Police Shootings a Year? No One Knows*, WASH. POST (Sept. 8, 2014), http://www.washingtonpost.com/news/post-nation/wp/2014/09/08/how-many-police-shootings-a-year-no-one-knows/ [https://perma.cc/4BUU-X85U] (quoting a Department of Justice statistician stating that FBI shooting data has "significant limitations in terms of coverage and reliability").

137. *See* Harmon, *supra* note 134, at 1134–35.

departments do not keep records pertaining to basic issues such as how regularly police officers use force against civilians; how often an officer claims to be a victim of crimes by civilians (e.g., how frequently the officer arrests civilians for assault of the officer or resisting arrest); or how many times civilians have complained that an officer mistreated them and whether those complaints were sustained.[138]

Even police departments that promulgate internal recordkeeping regulations often provide few incentives for police officers to comply with the regulations, or repercussions for those who do not. The Denver Police Department's operations manual, for example, requires all officers to self-report uses of force on civilians, and supervisors to investigate each use of force.[139] But the manual specifies no consequences for an officer's (or supervisor's) failure to comply with the reporting requirement.[140] When the Department of Justice investigated the Ferguson Police Department after Michael Brown's death at the hands of Officer Darren Wilson, it summarized the police department's policies for reviewing officers' use of force as "particularly ineffectual."[141] The DOJ noted that supervisors assigned to review uses of force "do little to no investigation; either do not understand or choose not to follow FPD's use-of-force policy in

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138. *See* CIV. RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 38 (2015) [hereinafter INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT], http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/6ZV3-GD7S] (finding that Ferguson Police Department had ineffectual policies for tracking and reviewing officer use of force); CIV. RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE 11 (2014), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf [https://perma.cc/W2U8-JYAX] (reporting that Cleveland police department had such poor recordkeeping that it could not determine whether civilian complaints had been investigated); CIV. RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT xvii-xviii, 79–80, 83–84, 88 (2011), https://s3.amazonaws.com/s3.documentcloud.org/documents/74332/justice-department-report-on-the-new-orleans.pdf [http://perma.cc/JNA4-HP87] (detailing similar problems in New Orleans Police Department).

139. DENVER POLICE DEPARTMENT OPERATIONS MANUAL, § 105.01(1)(b) (Use of Force Policy); § 105.02(1)(c)–(d) (Use of Force Procedures – Duty to Report), https://www.denvergov.org/content/dam/denvergov/Portals/720/documents/OperationsManual/OMSBook/OM_Book.pdf [https://perma.cc/7H5S-XPPJ].

140. *Id.* at § 105.02(1)(d)(5) (specifying that if a supervisor finds that violations may have occurred, he will immediately notify his commanding officer who will determine the appropriate course of action regarding additional investigation, i.e., notifying IAD, etc.); *see also* People v. Liechty, Case No. 16GS011155 (2016) (case documents on file with author) (after Denver police officer pushed civilian off bike and into metal railing, officer declined to report the use of force and supervisor failed to investigate; no investigation done into initial officer's use of force and no discipline levied for failure to report).

141. INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, *supra* note 138, at 38.

analyzing officer conduct; [and] rarely correct officer misconduct when they find it."[142] Police officers are also historically unwilling to report misconduct by fellow officers, so misconduct often goes unrecorded because officers do not tell on their own.[143]

In other police departments, data regarding police misconduct is missing because the departments have actively refused to collect it. In the past several years, many police departments have been found to expressly discourage reporting of police misconduct, or refuse to record complaints when civilians attempt to file them.[144] And, because the same police departments that receive reports of crime are often the sole agency responsible for investigating these crimes, they have ample opportunity to ensure that allegations of misconduct by police officers never come to light at all. In any of these situations, the police department may have no evidence of the reported misconduct because it was never recorded or investigated.

Other branches of the criminal justice system do no better job of memorializing officer misconduct. In the context of police testimony, scholars and practitioners alike have long recognized that police officers

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142. *Id.*

143. *E.g.*, N.Y. STATE. POLICE & CONN. OFFICE OF THE ATT'Y GEN., REPORT ON THE EVALUATION OF THE CONNECTICUT DEPARTMENT OF PUBLIC SAFETY INTERNAL AFFAIRS PROGRAM ii, 132 (2006), (reporting on Connecticut state troopers' attempts to cover up misconduct by other officers); Armacost, *supra* note 8, at 454 ("In the face of outside criticism, cops tend to circle the wagons, adopting a 'code of silence,' protecting each other, and defending each other's actions."); Bret D. Asbury, *Anti-Snitching Norms and Community Loyalty*, 89 OR. L. REV. 1257, 1285–90 (2011) (discussing police officers' unwillingness to report misconduct by their own); Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 237 (1998) ("Police officers . . . lie under oath because of the 'blue wall of silence,' an unwritten code in many departments which prohibits . . . testifying truthfully if the facts would implicate the conduct of a fellow officer."); Stan K. Shernock, *The Effects of Patrol Officers' Defensiveness Toward the Outside World on Their Ethical Orientations*, CRIM. JUSTICE ETHICS 24, 25 (1990) ("[I]t is an unwritten law in police departments that police officers must never testify against their brother officers.").

144. *See, e.g.*, ACLU OF CONN., PROTECT, SERVE AND LISTEN: ACCEPTING CIVILIAN COMPLAINTS AT CONNECTICUT POLICE DEPARTMENTS 1 (2012), https://www.acluct.org/sites/default/files/field_documents/protectservelisten.pdf [https://perma.cc/B89R-B6UH] (detailing deficiencies in Connecticut police departments' practices for accepting civilian complaints); ACLU OF N.J., THE CRISIS INSIDE POLICE INTERNAL AFFAIRS 5, 9–12 (2009), https://www.aclu-nj.org/files/3013/1540/4573/060409IA2.pdf [https://perma.cc/XG4X-E69W] (discussing common ways police departments inhibit citizens from filing complaints against police officers); Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 760, 775–76 (2004) (discussing secrecy provisions in civil settlements against police officers and departments); Rachel Moran, *Ending the Internal Affairs Farce*, 64 BUFF. L. REV. 837, 854–56 (2016) (collecting accounts of police departments that attempted to prevent civilians from filing complaints); Harmon, *supra* note 134, at 1130 (police departments often "discourag[e] citizens from filing complaints about officer conduct").

lie—frequently—when testifying.[145] Despite this widespread understanding, judges are extremely reluctant to call out officers for their lies or to suppress evidence based on officer incredibility.[146] In the rare instance a judge does find that an officer lied, that information is seldom recorded or stored in any searchable database. In most jurisdictions, neither the prosecutor's office nor the police department is required to keep records of police officers who are found to have testified falsely, and prosecutors have an obvious incentive not to record the information as they rely on these officers regularly to prove their cases, and would be required to inform defense counsel if they knew their officer witness had a history of false testimony.[147] Given these practices, a police officer may have a pattern of testifying falsely, yet no record of it will exist.

Even where records do exist, they may not accurately reflect misconduct that occurred. Police departments that rely on self-reporting of incidents such as use of force can expect that officers will underreport their own possible misconduct.[148] Police departments also often fail to properly investigate reports from outside parties. In most police departments, complaints of police misconduct are reviewed by internal affairs units with the same police department.[149] Accordingly, when a

145. *See supra* note 9.

146. *See* Russell D. Covey, *Abolishing Jailhouse Snitch Testimony*, 49 WAKE FOREST L. REV. 1375, 1413 (2014) (positing that judges are often reluctant to doubt police testimony); Laurie L. Levenson, *Unnerving the Judges: Judicial Responsibility for the Rampart Scandal*, 34 LOY. L.A. L. REV. 787, 790–91 (2001).

147. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (requiring government to disclose evidence within its possession that is exculpatory and material to the case); Levine, *Who Shouldn't Prosecute the Police*, *supra* note 17, at 1471 (discussing prosecutors' incentives to avoid inquiring into or recording instances of police perjury); Jaxon Van Derbeken, *Police with Problems Are a Problem for D.A.*, S.F. CHRON (May 16, 2010), http:// www.sfgate.com/bayarea/article/Police-with-problems-are-a-problem-for-D-A-3264681.php [https://perma.cc/ASS9-R7E9] (reporting prosecutor who said that colleagues "were not eager to dig into officers' backgrounds" because of credibility issues that could arise); Mark Fazlollah et al., *Philadelphia's DA Office Keeps Secret List of Suspect Police*, THE INQUIRER (Feb. 13, 2018), http://www.philly.com/philly/news/philadelphia-police-misconduct-list-larry-krasner-seth-williams-meek-mill-20180213.html [https://perma.cc/S8PT-W823] (describing Philadelphia DA's practice of compiling a list of police officers known to have credibility problems due to misconduct, but refusing to provide that list to defense attorneys in criminal cases).

148. COLLEEN LEWIS, COMPLAINTS AGAINST THE POLICE: THE POLITICS OF REFORM 9 (1999); Stephen Clarke, *Arrested Oversight: A Comparative Analysis and Case Study of How Civilian Oversight of the Police Should Function and How It Fails*, 43 COLUM. J.L. & SOC. PROBS. 1, 5 (2009).

149. MATTHEW J. HICKMAN, BUREAU OF JUSTICE STATISTICS, CITIZEN COMPLAINTS ABOUT POLICE USE OF FORCE 4–5 (2006), http://www.bjs.gov/content/pub/pdf/ccpuf.pdf [https://perma.cc/8R7X-3TLF]; *see also* Internal Affairs Unit, *Shielded From Justice: Police Brutality and Accountability in the United States*, HUMAN RIGHTS WATCH (1998), https://www.hrw.org/legacy/reports98/police/uspo25.htm [https://perma.cc/8XPS-JD62] ("Internal affairs divisions are at the center of any examination of how police departments deal with human rights abuses committed by officers."). For readers unfamiliar with the internal affairs review process

civilian complains about misconduct by an officer within a police department, other officers in that same department both receive and investigate the complaint.

In previous work, I have explained that internal affairs review is often biased—implicitly or, not uncommonly, overtly—in favor of the officers, and conducted with the intent to justify the officers' behavior.[150] Internal affairs review has historically produced extremely low rates of sustained complaints.[151] Internal affairs records may exonerate an officer, or decline to sustain a complaint, even when the officer did engage in misconduct.[152] Other internal affairs departments routinely fail to review the complaint at all, thus leaving no paper trail other than perhaps the complaint itself, and no resolution as to whether the officer engaged in misconduct.[153]

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and how it traditionally operates, I recommend two works: U.S. DEP'T OF JUSTICE, STANDARDS AND GUIDELINES FOR INTERNAL AFFAIRS: RECOMMENDATIONS FROM A COMMUNITY OF PRACTICE, http://ric-zai-inc.com/Publications/cops-p164-pub.pdf [https://perma.cc/3TYE-GQ2L] (providing guidelines for what should happen when a civilian files a complaint with an internal affairs unit) and Ryan J. Reilly, *Here's What Happens When You Complain to Cops About Cops*, HUFFPOST (Oct. 13, 2015), http://www.huffingtonpost.com/entry/internal-affairs-police-misconduct_us_5613ea2fe4b022a4ce5f87ce [https://perma.cc/67R5-X25N] (discussing what happens when a citizen tries to file a complaint with an internal affairs unit).

150. Moran, *Ending the Internal Affairs Farce*, *supra* note 144; *see also* Garcia v. City of Newark, No. 08-1725 (SRC), 2011 WL 689616, at *34 (D.N.J. Feb. 16, 2011) (concluding that Newark Police Department's internal affairs unit had a pattern of "almost invariably reject[ing]" civilian complaints); OFFICE OF THE INDEP. POLICE AUDITOR, CITY OF SAN JOSE, 2014 IPA YEAR END REPORT 9, 63 (2014), http://www.sanjoseca.gov/DocumentCenter/View/42029 [https://perma.cc/2FVY-5KJ2] (as of 2014, the San Jose Police Department had never sustained a complaint of racial bias by an officer); Walter Katz, *Enhancing Accountability and Trust with Independent Investigations of Police Lethal Force*, 128 HARV. L. REV. F. 235, 238 (2015) (noting that the system of internal review has been "criticized for years for its inherent bias"); Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 503 (2008); INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE, *supra* note 138, at 5, 35 (internal affairs investigators admitting that they reviewed complaints with the goal of exonerating the accused officers); N.Y. STATE POLICE, *supra* note 143, at ii, 133.

151. Moran, *In Police We Trust*, *supra* note 18, at 979–80 (citing numerous agencies with extremely low percentages of sustained complaints).

152. *E.g.*, INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT, *supra* note 138, at vii, 18 (finding that New Orleans PD supervisors routinely approved uses of force even when it was clearly unjustified); U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE SEATTLE POLICE DEPARTMENT 4, 12, 19 (2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/12/16/spd_findletter_12-16-11.pdf [https://perma.cc/TA39-9W36] (concluding that Seattle PD's review process was designed to rubber-stamp officers' use of force).

153. *E.g.*, Noble v. City of Camden, 112 F. Supp. 3d 208, 217 (D.N.J. 2015); INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, *supra* note 138, at 2, 83 (noting that the Ferguson Police Department frequently failed to review complaints); INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE, *supra* note 138, at 11 (reporting "serious concerns" regarding the Cleveland Police Department's internal affairs review process, particularly pertaining to "use of force and accountability-related documents"); OIR GROUP, REPORT ON THE USE OF FORCE AND INTERNAL AFFAIRS OPERATIONS IN THE DENVER SHERIFF DEPARTMENT 47 (2015),

Independent review agencies—entities other than police departments created, in part, to review complaints alleging police misconduct[154]—are not a panacea to the ills of inaccurate records. Although the agencies are ostensibly intended to alleviate the bias in internal affairs units, many are staffed by former police officers, or otherwise have close ties to the officers and departments they are supposed to hold accountable.[155] These agencies also tend to sustain an inordinately low percentage of complaints of officer misconduct.[156]

Lastly, even if the records existed at one time, they may not exist by the time a defendant seeks to use them. A recent review of sixty police department contracts revealed that more than one-third contained provisions allowing or even requiring police departments and review agencies to destroy civilian complaint records after a period of years.[157] Some states also allow government agencies to destroy police disciplinary records after a period of three or five years.[158] In contrast to records of defendants' convictions, which are typically preserved for the defendant's entire life and beyond, police officers found to have committed

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https://docs.wixstatic.com/ugd/d85a96_d9c8a5c357224183bfa30fc58d9bddab.pdf [https://perma.cc/HX48-MF3A] (Denver Sheriff's Department Internal Affairs Unit failed to investigate multiple complaints); *see also* Moran, *Ending the Internal Affairs Farce*, *supra* note 144, at 856–58.

154. SAMUEL WALKER, POLICE ACCOUNTABILITY: THE ROLE OF CIVILIAN OVERSIGHT (2001); Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards*, 28 COLUM. HUM. RTS. L. REV. 551, 593 (1997); SAMUEL WALKER, *Alternative Models of Citizen Oversight*, *in* CITIZEN OVERSIGHT OF LAW ENFORCEMENT 11 (2006).

155. *See* CHI. POLICE ACCOUNTABILITY TASK FORCE, RECOMMENDATIONS FOR REFORM: RESTORING TRUST BETWEEN THE CHICAGO POLICE AND THE COMMUNITIES THEY SERVE 79 (2016), https://chicagopatf.org/wp-content/uploads/2016/04/PATF_Final_Report_4_13_16-1.pdf [https://perma.cc/5J43-T8KV] (noting the "persistent failure" of Chicago's independent review authority to hold police officers accountable for misconduct); Radley Balko, *The South Carolina Police Files: Gunslinging Raids, Coverups and Magical Dog Sniffs*, WASH. POST (May 31, 2016), https://www.washingtonpost.com/news/the-watch/wp/2016/05/31/the-south-carolina-police-files-gunslinging-raids-coverups-and-magical-dog-sniffs/ [https://perma.cc/SQP9-KC5W]; Chip Mitchell, *City Sends Police-Shooting Investigators to Trainer Accused of Pro-Cop Bias*, WBEZ NEWS (Sep. 28, 2015), http://www.wbez.org/news/city-sends-police-shooting-investigators-trainer-accused-pro-cop-bias-113077 [https://perma.cc/9T2V-VEYZ]; Moran, *In Police We Trust*, *supra* note 18 at 973–74.

156. *See* Moran, *Ending the Internal Affairs Farce*, *supra* note 144, at 868–79 (discussing numerous flaws in design of independent review agencies and their low percentage of sustained complaints).

157. Adeshina Emmanuel, *How Union Contracts Shield Police Departments from DOJ Reforms*, IN THESE TIMES (June 21, 2016), http://inthesetimes.com/features/police-killings-union-contracts.html [https://perma.cc/76U5-GNEE].

158. *E.g.*, CAL. PENAL CODE § 832.5(b) (2017); Montgomery County v. Shropshire, 23 A.3d 205, 212 (Md. 2011).

misconduct may have all records of that misconduct destroyed just a few years later.

B. Access to Police Misconduct Records: Doctrinal and Political Reluctance

While non-existence of police misconduct records is one major hindrance to defense counsel's efforts to contest the credibility of a police officer witness, inability to access existing records is another. Before turning specifically to the difficulties defendants face when attempting to obtain police personnel records in criminal cases, a brief discussion of the general process for obtaining documentary evidence in criminal cases is important for comparison purposes. Criminal discovery is significantly more limited than civil discovery, and is often confined to statements of witnesses or the defendant, or police reports summarizing the government's investigation into the charged case.[159] However, both parties have subpoena power.[160] If a defendant wants to obtain documentary evidence pertaining to a lay witness in a case, the defendant may move for a subpoena *duces tecum* requiring the witness (or party in possession of the documents) to produce the requested items. The court will quash or modify the subpoena only if compliance would be unreasonable or oppressive to the non-moving party.[161]

In contrast to the general process for subpoenaing records pertaining to lay witnesses in criminal cases, the vast majority of jurisdictions[162] have laws that protect the confidentiality of police personnel records, and many of these states either prohibit or make it extremely difficult for defense counsel to access these confidential records.[163] These laws are expressions

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159. *Compare* FED. R. CIV. P. 26, *with* FED. R. CRIM. P. 16. *See also, e.g.*, Dig. Equip. Corp. v. Currie Enters., 142 F.R.D. 8, 13 (D. Mass. 1991) (summarizing the differences between civil and criminal discovery); David A. Hyman, *When Rules Collide: Procedural Intersection and the Rule of Law*, 71 TUL. L. REV. 1389, 1397 (1997) ("Criminal cases provide for very restricted discovery, while civil cases allow quite expansive discovery.").

160. *E.g.*, FED. R. CRIM. P. 17; COLO. R. CRIM. P. 17.

161. *E.g.*, FED. R. CRIM. P. 17(c); COLO. R. CRIM. P. 17(c).

162. While the exact number of states that permit public access to police records is open to dispute (in part because even states with ostensible public-access regimes still withhold some records), it is definitely a significant minority. *Compare* Abel, *supra* note 8, at 770, n.143 (asserting that only eight states—Florida, Texas, Minnesota, Arizona, Tennessee, Kentucky, Louisiana, and South Carolina—make police personnel records available to the public), *with* PROJECT WNYC, *Disciplinary Records*, https://project.wnyc.org/disciplinary-records/ [https://perma.cc/4TNG-H3AC] (concluding that twelve states make police records generally available to the public, but still withhold some records as confidential).

163. *See, e.g.*, AURORA, COLO. MUN. CODE § 50-41 (2017) (placing strict limitations on disclosure of police records even when deemed relevant to criminal proceedings); N.Y. CIV. RIGHTS LAW § 50-

of both doctrinal and political reluctance. As a doctrinal matter, lawmakers frequently justify their unwillingness to allow defense counsel access to police records by theorizing that such access would violate officers' rights to privacy, and would chill officers' speech and conduct.[164] As a political matter, police departments tend to have strong unions, reigning in police is far less popular than being "tough" on criminals, and few lawmakers are willing to stand up to police department demands that their personnel records—including misconduct records—remain confidential.[165] However the objection is framed, the result is that the defendant has little or no ability to access information about the person on whose testimony a conviction or acquittal may rest. Although police personnel records "constitute a potential gold mine of information valuable to one accused of a crime against a peace officer," they are nonetheless, in many situations, off-limits to the accused.[166]

The strictest jurisdictions protect police personnel records from disclosure in virtually every circumstance. Vermont, for example, has a state statute providing that police internal affairs records "shall be confidential," with only four exceptions, none of which pertain to criminal

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a (McKinney 2016) (preventing disclosure of police records except by court order); Copley Press, Inc. v. Superior Court, 141 P.3d 288, 296, 311 (Cal. 2006) (holding that police personnel records are confidential under state law); David Packman, *Police Misconduct Disclosure Laws*, CATO INST. (Feb. 7, 2010), http://www.policemisconduct.net/police-misconduct-disclosure-laws/ [https://perma.cc/G7UX-TCXA] (summarizing police misconduct disclosure laws in all fifty states); Abel, *supra* note 8, at 745–46 (discussing how various state and city laws hamper disclosure of police personnel records in criminal cases).

164. *E.g.*, CAL. PENAL CODE § 832.7 (2017); People v. Zamora, 615 P.2d 1361, 1369 (Cal. 1980) (expressing concern that, if officers' records are available in criminal trials, the officers may make fewer arrests because the arrestees will not be prosecuted anyway); People v. Norman, 350 N.Y.S. 2d 52 (N.Y. 1973); David A. Plymyer, *Shining a Light on Police Misconduct*, BALT. SUN (Jan. 19, 2016), http://www.baltimoresun.com/news/opinion/oped/bs-ed-police-transparency-20160119-story.html [https://perma.cc/29S8-HKP8] (noting that the Fraternal Order of Police in Baltimore objected to disclosure of police records because it would "embarrass[ ]" the police officers).

165. *See* Abel, *supra* note 8, at 746–47 (discussing police unions' ability to pressure prosecutors not to disclose *Brady* evidence); Clarke, *supra* note 148, at 5 ("Crime control is often a higher political priority than preventing police misconduct."); David M. Jaros, *Preempting the Police*, 55 B.C. L. REV. 1149, 1151 (2014) ("[T]he politics of crime tends to deter politicians from taking an active role in limiting police power."); Levine, *Police Suspects*, *supra* note 17, at 1205–06 (noting that police officers are able to negotiate or lobby for preferential treatment in the justice system); Levine, *Who Shouldn't Prosecute the Police*, *supra* note 17, at 1475–76 (discussing intense political pressure from police unions not to prosecute police suspects); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2468 (1996) (observing that the U.S. Supreme Court has in recent decades "clearly become less sympathetic to claims of individual rights and more accommodating to assertions of the need for public order").

166. *See* Jeffrey F. Ghent, *Accused's Right to Discovery or Inspection of Records of Prior Complaints Against, or Similar Personnel Records of, Peace Officer Involved in the Case*, 86 A.L.R.3D 1170, § 2[a] (2017 supp.).

defendants.[167] The Supreme Court of Vermont has interpreted this statute as prohibiting defendants in criminal cases from obtaining police officers' internal affairs records.[168] In *State v. Roy*, [169] the defendant was charged with assault of a police officer and attempting to elude a police officer, and sought the personnel file of the officer he allegedly attacked, to show that the officer had a history of using excessive force while making arrests.[170] The Vermont Supreme Court held that, because internal affairs records are confidential under state statute, they could neither be disclosed to defense counsel nor used at trial.[171]

Most states do not impose absolute bars on access to such evidence, but instead make it extremely difficult for defense counsel to obtain the evidence. The New York law governing disclosure of police records is a prime example.[172] The law covers a broad swath of law enforcement records, providing that "[a]ll personnel records used to evaluate performance toward continued employment or promotion" shall be "considered confidential and not subject to inspection or review" without express consent, in writing, from the police officer whose records are at issue.[173] The only exception to this mandatory confidentiality provision is a "lawful court order."[174] A court may lawfully order disclosure of the records, however, only after a hearing in which the defendant makes a "clear showing of facts sufficient to warrant the judge to request records for review."[175] If the judge finds that the defendant has satisfied the "clear showing" standard, the judge may order disclosure of the records only in sealed form, and only to the court, not to defense counsel.[176] If the judge reviews the personnel records and determines that they are both "relevant and material" to the case, then and only then may the judge disclose those

167. 20 V.S. § 1923(d) (2018). Vermont also recently enacted a separate statute granting public access to anonymized records of complaints against police officers (though not records of the internal investigations), as well as records of formal charges against officers that resulted in discipline. *See* 20 V.S. § 2409 (2018).

168. State v. Roy, 557 A.2d 884, 893 (Vt. 1989), *overruled on other grounds by* State v. Brillon, 955 A.2d 1108 (Vt. 2008).

169. 557 A.2d 884 (Vt. 1989).

170. *Id.* at 886, 892–95.

171. *Id.* at 893–95 (noting, however, that the defendant failed to raise the issue until the day of trial, and that the court did "not exclude the possibility that a defendant could have access to internal investigation files in a proper case and in a proper manner").

172. N.Y. CIV. RIGHTS LAW § 50-a (McKinney 2016).

173. *Id.* at (1).

174. *Id.*

175. *Id.* at (2).

176. *Id.* at (3).

records to defense counsel.[177] Notably, the confidentiality law does not apply at all to prosecutors within the state; they may access the records upon only a showing that the request is "in the furtherance of their official functions."[178]

It is no secret that the law is aimed to prevent defense attorneys from accessing police records. New York courts have expressly admitted just that, repeatedly stating that the purpose of the law is to prohibit "fishing expeditions" by lawyers looking for "collateral materials to be used for impeachment purposes."[179] But scouring collateral records for impeachment evidence is what prosecutors do all the time against defendants, and the law does not prevent prosecutors from doing so.[180]

As for the "clear showing" burden, New York courts have interpreted this as requiring that defendants have a "good faith . . . factual predicate"[181] to show that the police personnel record in question actually contains "information, which, if known to the trier of fact, could very well affect the outcome of the trial."[182] This is circular reasoning, of course. The defendant can hardly be expected to show that the records exist to obtain permission to review the records, if the defendant cannot access the records without first making a clear showing that they exist. Nonetheless, it is a common justification of courts when denying such motions.[183]

California similarly puts "strict limits" on disclosure of police misconduct records to defendants in criminal proceedings.[184] By state statute—enacted specifically to protect peace officer personnel records

177. *Id.*

178. *Id.* at (4).

179. *See, e.g.*, Dunnigan v. Waverly Police Dep't, 279 A.D.2d 833, 834 (N.Y. App. Div. 2001) ("[The statute] is designed to eliminate fishing expeditions into police officers' personnel files for collateral materials to be used for impeachment purposes . . . ."); Zarn v. City of New York, 198 A.D.2d 220, 220–21 (N.Y. App. Div. 1993) (same); Capital Newspapers Div. of Hearst Corp. v. Burns, 109 A.D.2d 92, 95 (N.Y. App. Div. 1985), *aff'd*, 496 N.E.2d 665 (1986) (affirming that N.Y. Civ. Rights Law § 50-a was designed to prevent defense attorneys from "fishing expeditions" into police officers' personnel files).

180. *See supra* Part I.

181. People v. Gissendanner, 399 N.E. 2d 924, 928 (N.Y. 1979) (citing N.Y. CIV. RIGHTS LAW § 50-a for proposition that defense counsel must have a good-faith reason to believe that disciplinary records exist before the court will grant a request to review the file).

182. *Id.* at 927.

183. *See, e.g.*, *id.* at 928 (noting that courts can deny defendants access to police records if defendants cannot articulate the relevance and materiality of the records).

184. *See* Copley Press, Inc. v. Superior Court, 141 P.3d 288, 296 (Cal. 2006); Swetha Kannan et al., *You've Been Arrested by a Dishonest Cop. Can You Win in a System Set Up to Protect Officers?*, L.A. TIMES (Aug. 9, 2018), http://www.latimes.com/projects/la-me-brady-list-secrecy/ [https://perma.cc/TY84-54MU].

from discovery in civil or criminal proceedings—police personnel records in California are confidential, and can be disclosed in criminal proceedings only if the defendant satisfies numerous specified conditions.[185] If the defendant seeks such records, the defendant must first file a written motion served upon both the court and the party in possession of the records, describing the "type of records or information sought."[186] Much like New York, California requires a defendant to show "good cause" for disclosure of the requested records, including an affidavit explaining the defendant's "reasonable belief that the governmental agency identified has the records or information from the records."[187] Here too, the defendant must show that the records exist before the defendant can examine the records to see what exists. One California Supreme Court case has recognized that this rule puts defendants in the untenable position of "having to allege with particularity the very information he is seeking."[188]

Many states put the onus on defendants to assert specific facts showing both that the requested police records exist and that they would involve information material to the defense. In Colorado, defendants must first "set[ ] forth a specific factual basis" to show that the requested records both exist and contain evidence material to the case before a court will grant a motion for subpoena *duces tecum* of the records.[189] Other state courts have denied defendants' requests for personnel records of law enforcement officers, on the basis that the defendants could not first make a specific showing that the confidential records contained information pertinent to the theory of defense.[190]

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185. CAL. PENAL CODE § 832.7(a) (2017); SEN. COM. ON JUDICIARY, CITIZENS' COMPLAINTS & PEACE OFFICER PERSONNEL RECORDS 1 (Apr. 3, 1978).

186. CAL. EVID. CODE § 1043(a)–(b) (West 2018). These motions are referred to as "Pitchess" motions because of the case that originally set out standards (now codified in CAL. EVID. CODE § 1043) for defendants seeking to obtain police records in criminal cases. *See* Pitchess v. Superior Court, 522 P.2d 305 (Cal. 1974); Corina Knoll et al., *An L.A. County Deputy Faked Evidence. Here's How His Misconduct was Kept Secret in Court for Years*, L.A. TIMES (Aug. 9, 2018), http://www.latimes.com/local/california/la-me-brady-list-secrecy-court-20180809-htmlstory.html# [https://perma.cc/RS6G-H8X3].

187. CAL. EVID. CODE § 1043(b)(3).

188. People v. Memro, 700 P.2d 446, 464 (Cal. 1985); *see also* Fletcher v. Superior Court, 123 Cal. Rptr. 2d 99, 104 n.3 (Cal. Dist. Ct. App. 2002) (labeling the statutory scheme for requesting disclosure of police records as "a set of circumstances in which one requirement . . . is dependent upon another, which is in turn dependent upon the first").

189. People v. Spykstra, 234 P.3d 662, 666, 669 (Colo. 2010); *see also* Martinelli v. Dist. Court, 612 P.2d 1083, 1088 (Colo. 1980) (en banc); People v. Blackmon, 20 P.3d 1215, 1220 (Colo. App. 2000).

190. *E.g.*, N.C. GEN. STAT. § 126-24 (2014); *id.* at § 160A-168 (exempting personnel records from public access); CONN. GEN. STAT. § 1-210(b)(2) (2013) (exempting personnel records from disclosure to the public if such disclosure would constitute an "invasion of personal privacy"); State v. Jones,

Although some might assume that defendants can overcome the hurdle of figuring out whether the records exist (and what they would say) by first deposing the police officer who is the subject of the prospective records, that solution is far more feasible for civil litigants than criminal defendants. Approximately 80% of states provide no right to depositions in criminal cases.[191] Accordingly, unless defense counsel has other avenues for obtaining information about the police officer witness, counsel's only hope is attempting an interview, which the officer can—and typically does—refuse.

Still other jurisdictions have statutes or ordinances that allow defense counsel to move for subpoena of police personnel records, but only if the defendant is charged with a specific, limited category of offenses.[192] One such model is the Aurora, Colorado municipal code, which provides that if (and only if) the charges against the defendant involve an allegation of "actual application of physical force" by the defendant upon a police officer, or by the police officer upon a defendant, then the defendant may move for subpoena *duces tecum* of a small class of police personnel records.[193] In order to obtain the subpoena, the defendant must "make an initial showing to the court why the production of such files is reasonable

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59 A.3d 320 (Conn. App. 2013) (denying defendant's request for officer's personnel records because defendant did not offer information to suggest that the personnel file contained evidence pertaining to officer's credibility in prosecution for assault of a police officer); *In re* Brooks, 548 S.E.2d 748, 755 (N.C. Ct. App. 2001) (denying request for police officer internal affairs records because the request was insufficiently specific and not supported by affidavit); State v. Cano, 743 P.2d 956 (Ariz. Ct. App. 1987) (denying defendant's request for personnel records of law enforcement officer who he was charged with assaulting, where defendant did not make showing that officer had history of dishonesty); Jinks v. State, 274 S.E.2d 46 (Ga. App. 1980) (properly denying defendant access to officer's personnel file, where defendant failed to show anything in the file was exculpatory, in prosecution for battery of police officer); *see also* Ghent, *supra* note 166, at § 3[a] (summarizing similar cases).

191. Romualdo P. Eclavea, *Accused's Right to Depose Prospective Witnesses Before Trial in State Court*, 2 A.L.R. 4TH 704, § 2 ("Traditionally, a person accused of crime has been held not entitled to take the pretrial depositions of prospective witnesses."); *see* N.H. REV. STAT. § 517:13 (2017) (permitting depositions in criminal cases only at the discretion of the judge and where the party seeking the deposition proves it necessary by a preponderance of the evidence); FED. R. CRIM. P. 15(a) (governing the deposition of witnesses in criminal cases, and providing that courts may grant motions for depositions in "exceptional circumstances and in the interest of justice"); WAYNE R. LAFAVE ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS 1235 (8th ed. 1994) (reporting that only ten states permit depositions in criminal cases).

192. *See* Ghent, *supra* note 166, at § 2[a] (collecting cases for the proposition that jurisdictions are most likely to permit disclosure of police personnel records when the defendant is charged with violence against an officer, and that disclosure of the records is often "totally denied" in cases that do not involve an allegation of violence against an officer).

193. AURORA, COLO. MUNI. CODE. § 50-41(a)(1) (2017).

and necessary in the preparation of his or her defense."[194] If the defendant can satisfy the initial burden of showing why the records are reasonable and necessary to the preparation of his or her defense, then the police department will be ordered to produce only those records "involving allegations of excessive use of force, brutality, or misrepresentation or untruthfulness on the part of the officer involved."[195] Those records shall then be produced, under seal, to the court for in camera review; the court need only release to defense counsel the records that it deems relevant and material to the defense.[196] In determining whether the records should be released, the court may weigh a wide variety of factors, including not only the necessity of the information to the defendant's case, but also, *inter alia*, the impact that disclosure may have on the police officer, and the degree to which various government interests may be thwarted by release of the records.[197] The defendant must bear the costs associated with producing any of the released materials.[198]

To the surprise of many scholars and practitioners, the fact that the police records may contain exculpatory evidence does not render the records necessarily disclosable under all state laws. More than fifty years ago, in *Brady v. Maryland*,[199] the U.S. Supreme Court famously held that the prosecution must disclose to defendants in criminal cases all material exculpatory evidence known to the prosecution.[200] However, for prosecutors to disclose evidence, they must first know of it.[201] Although U.S. Supreme Court case law has interpreted *Brady* as requiring prosecutors to disclose evidence within the possession of the police, on the theory that the police are an arm of the prosecutor's office,[202] some

194. *Id.* at (a)(2).

195. *Id.* at (a)(3).

196. *Id.* at (b)–(c).

197. *Id.* at (b).

198. *Id.* at (f).

199. 373 U.S. 83 (1963).

200. *Id.*; *see also* Giglio v. United States, 405 U.S. 150 (1972) (holding that the prosecutor's failure to disclose material evidence affecting the credibility of a witness may violate due process); MODEL RULES OF PROF'L CONDUCT r. 3.8(d) (AM. BAR ASS'N 2016) (stating that prosecutors shall "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense").

201. *See* Abel, *supra* note 8; MODEL RULES OF PROF'L CONDUCT r. 3.8(d) (AM. BAR ASS'N 2016).

202. Kyles v. Whitley, 514 U.S. 419, 437 (1995); *see also* Youngblood v. West Virginia, 547 U.S. 867, 869–70 (2006) (per curiam); Banks v. Dretke, 540 U.S. 668, 693 (2004); People v. Gutierrez, 6 Cal. Rptr. 3d 138, 144 (Cal. Ct. App. 2003).

states have exempted police personnel records from *Brady*'s reach by refusing to allow prosecutors access to the police records.[203]

Jonathan Abel has labeled misconduct evidence in police personnel files "a critical source of *Brady* material that even well-meaning prosecutors are often unable to discover or disclose."[204] A California court recently interpreted California's police records statute as preventing the Los Angeles Sheriff's Department from voluntarily disclosing evidence to the prosecutor's office of 300 officers found guilty of significant misconduct, including offenses such as making false statements, tampering with evidence, and using excessive force.[205] When the Sheriff attempted to provide this evidence to the prosecutor's office, the Los Angeles Deputy Sheriff's union sued.[206] The California Court of Appeals sided with the union, finding that, under California's confidentiality provisions, the Sheriff could not provide this information even to the prosecutor's office.[207] The California Supreme Court has agreed to review the question of whether law enforcement agencies may reveal the names of officers on an "internal Brady list" to prosecuting agencies.[208]

In other jurisdictions, prosecutors have statutory access to police personnel records, but purposely do not seek them out, so as to remain ignorant of any exculpatory information those records might contain.[209] And courts permit this: In New York, for example, the Court of Appeals

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203. *E.g.*, CAL. PENAL CODE § 832.7 (West 2017); 20 V.S.A. § 1923(d) (2017).

204. Abel, *supra* note 8, at 745.

205. Ass'n for L.A. Deputy Sheriffs v. Superior Court of Cal. et al., 221 Cal. Rptr. 3d 51 (Cal. Ct. App. 2017), *petition for review granted*, 403 P.3d 144 (Cal. Oct. 11, 2017); *see also* Jessica Pishko, *Why Are the Courts Protecting Bad Cops?*, SLATE (Mar. 15, 2017), http://www.slate.com/articles/news_and_politics/trials_and_error/2017/03/the_l_a_county_sheriff_wants_to_reveal_300_problem_cops_the_courts_won_t.html [https://perma.cc/6VWM-RTC5].

206. *Ass'n for L.A. Deputy Sheriffs*, 221 Cal. Rptr. 3d at 57.

207. *Id.*; *see also* People v. Superior Court of S. F., 377 P.3d 847 (Cal. 2015) (prosecutors comply with *Brady* obligations by informing defense counsel of personnel records they know about; if personnel records are unknown, prosecutors have no obligation to disclose). *But see, e.g.*, ME. REV. STAT. tit. 30-A, § 503 (2014) (allowing prosecutors to disclose confidential personnel records in criminal cases, if necessary to comply with *Brady*).

208. Ass'n for L.A. Deputy Sheriffs v. Superior Court of California et al., 403 P.3d 144 (Cal. Oct. 11, 2017).

209. *See* Abel, *supra* note 8, at 775–78 (and citations therein) (discussing jurisdictions where prosecutors make no attempt to discover evidence of police misconduct within personnel records). *But see, e.g.*, WASH. ASS'N OF SHERIFFS & POLICE CHIEFS, MODEL POLICY FOR LAW ENFORCEMENT AGENCIES REGARDING BRADY EVIDENCE AND LAW ENFORCEMENT WITNESSES WHO ARE EMPLOYEES/OFFICERS 3 (2009) (calling on prosecutors to review police personnel files and disclose *Brady* evidence); WASH. ASS'N OF PROSECUTING ATT'YS, MODEL POLICY, DISCLOSURE OF POTENTIAL IMPEACHMENT EVIDENCE FOR RECURRING INVESTIGATIVE OR PROFESSIONAL WITNESSES 3–5 (2013) (same).

has held that, while prosecutors should not be explicitly discouraged from investigating potential police misconduct, they are not required to ask officer witnesses about a history of misconduct in order to fulfill their *Brady* obligations.[210]

Still other states leave room to sidestep *Brady* by holding that the right to exculpatory evidence must be balanced against the right to confidentiality in privileged information. Colorado has gone so far as to conclude—though in a distinct setting, involving evidence that was not in the government's possession—that a defendant's right to exculpatory evidence must be balanced against "the competing interests of a witness to protect personal information and of the government to prevent unnecessary trial delays and unwarranted harassment of witnesses."[211] The District of Columbia Court of Appeals, taking another tactic, has simply declined to find that evidence of prior police misconduct is exculpatory, and instead held that it cannot be used for impeachment purposes at trial.[212] The U.S. Supreme Court has never decided a *Brady* case involving disclosure of police personnel records, and thus has never provided desperately-needed guidance to lower courts or practitioners on how to apply *Brady* in the context of these records.

Lastly, it is worth noting that even if records exist and the court orders disclosure, those in possession may still not disclose them. The records that defense counsel are seeking are, in most situations, held exclusively by the police department, and sometimes also the prosecutor's office. These entities have the greatest incentive not to disclose the records if the records are damaging to the cases they are charging and prosecuting. They may also be able to withhold the evidence with little fear of being discovered, because no one else has access to it—if defense counsel seeks police records and the police department responds that the records do not exist, the inquiry generally stops there. Though I do not suggest this

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210. People v. Garrett, 18 N.E.3d 722, 732 (N.Y. 2014); *see also* COMM. ON ETHICS & PROF'L RESPONSIBILITY, AM. BAR ASSOC., FORMAL OPINION 09-454, PROSECUTOR'S DUTY TO DISCLOSE EVIDENCE AND INFORMATION FAVORABLE TO THE DEFENSE 4 (2009) (concluding that Model Rule of Professional Conduct 3.8 "does not establish a duty to undertake an investigation in search of exculpatory evidence"). *But see, e.g.*, State v. Theodosopoulos, 893 A.2d 712, 714 (N.H. 2006) (requiring prosecutor to review police personnel files).

211. People v. Spykstra, 234 P.3d 662, 670–71 (Colo. 2010) (holding that a defendant's right to exculpatory evidence is "not absolute"); *see also* Martinelli v. Dist. Court, 612 P.2d 1083, 1091 (Colo. 1980) (en banc) (addressing requests for disclosure of police records in the civil context, and holding that trial courts can refuse to disclose privileged records).

212. *See* United States v. Akers, 374 A.2d 874 (D.C. Ct. App. 1977) (holding that trial court abused its discretion by ordering release of records showing that police officers had previously used excessive force on other civilians where defendants were charged with assaulting those officers, because such evidence was not admissible to impeach the officers).

happens in the majority of cases, the problem of prosecutors withholding *Brady* evidence is common enough to infer that withholding of police personnel records likely occurs as well.[213]

C. Use of Police Misconduct Records: Judicial Reluctance

The Federal Rules of Evidence, and state bodies of law patterned on the Federal Rules, do not explicitly address use or admission of police misconduct records at trial. In some jurisdictions, courts never reach—and defense attorneys rarely litigate—the issue of whether the records can be admitted at trial, because the records are either deemed completely confidential and thus not available for access by defense counsel,[214] or are available only in prosecutions for certain charges.[215] If defense counsel cannot access the records, counsel obviously cannot use them at trial.

In jurisdictions that do not definitively bar police records from being disclosed in criminal trials, the question of whether the records are admissible at trial is closely—at times inseparably—linked to the issue of access. Many of the statutes discussed in Section B of this Part vest trial courts with discretion to release police records, but place on defendants the burden of showing with specificity that the records both exist and are relevant, material, and necessary to defense of the charged case.[216] Thus, the determination of whether the records are relevant, and presumptively admissible at trial,[217] is expressly wrapped up in the process judges engage in when deciding whether to release the records at all.

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213. *E.g.*, United States v. Jones, 620 F. Supp. 2d 163, 166 (D. Mass. 2009); Notice of Filing of Report to Hon. Emmet G. Sullivan, *In re* Special Proceedings, No. 09-0198 (EGS), (D.D.C. Mar. 15, 2012), 2012 WL 858523; David Jaros, *Criminal Doctrines of Faith* (Univ. of Baltimore Sch. of Law Legal Stud. Research Paper, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3126451 (last visited Sept. 19, 2018) (positing that the Supreme Court has been overly dismissive of concerns regarding prosecutorial misconduct and withholding exculpatory evidence); Neil A. Lewis, *Tables Turned on Prosecution in Stevens Case*, N.Y. TIMES (Apr. 7, 2009), http://www.nytimes.com/2009/04/08/us/politics/08stevens.html (last visited Sept. 30, 2018); Editorial, *Rampant Prosecutorial Misconduct*, N.Y. TIMES (Jan. 4, 2014), http://www.nytimes.com/2014/01/05/opinion/sunday/rampant-prosecutorial-misconduct.html (last visited Sept. 30, 2018).

214. *See supra* notes 161–164.

215. *See supra* notes 165–190.

216. AURORA, COLO. MUNI. CODE. § 50-41(a)(2) (2017); CAL. EVID. CODE § 1043((b)(3) (West 2018); People v. Gissendanner, 399 N.E. 2d 924, 927–29 (N.Y. 1979); *In re* Brooks, 548 S.E.2d 748, 755 (N.C. Ct. App. 2001); People v. Blackmon, 20 P.3d 1215, 1220 (Colo. App. 2000).

217. *See* FED. R. EVID. 402 ("Relevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme Court.").

In practice, when told that defendants have the burden of establishing that the requested records are not only relevant but material and necessary to the defense, judges often default to simply not releasing the records at all.[218] This is in part the result of political pressures: police departments routinely object to records requests, even when the request is merely for in camera review by judges.[219] Being known as the judge who overrules the police and requires them to disclose records is hardly a popular position, and state court judges in particular are vulnerable to political pressure.[220] As a practical matter, judges also have busy dockets. Lengthy hearings about whether to release information, with attorneys for the police officer, police department, and prosecutor's office all objecting, cut into precious court time. When the initial burden is on the defendant to show that the records exist and are relevant to his case, it may be easier to simply conclude that the defendant did not meet his burden, than to require the police department to produce the records, find time for the judge to review the records, and then engage in a lengthy battle about whether the records should be released and admitted into evidence at trial.

Beyond political pressures and time constraints, judges also have a tendency to trust and defer to the police, as I have noted in earlier work.[221] Many judges are former prosecutors, who have had long working relationships with police officers.[222] Most are also white men, a

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218. Milstead v. Johnson, 883 N.W.2d 725 (S.D. 2016) (declining to require production of police officer-complainant's personnel records on grounds that defendant's request was not sufficiently specific in prosecution for assault of a police officer); *see also* City of Los Angeles v. Superior Court of L.A. Cty. 52 P.3d 129, 141–43 (Cal. 2002) (Moreno, J., dissenting) (citing City of Santa Cruz v. Mun. Court, 776 P.2d 222, 227 (Cal. 1989) (en banc)) (complaining that trial courts far too often decide requests for police records by prohibiting the defendant access); Robinson v. State, 730 A.2d 181, 185 (Md. 1999) (reviewing internal affairs records of officers and determining "that there is no exculpatory information in either of those two [records]" in murder case where police officers were key witnesses against defendant).

219. Cynthia H. Conti-Cook, *Defending the Public: Police Accountability in the Courtroom*, 46 SETON HALL L. REV. 1063, 1075 (2016).

220. *See* Slagle v. Bagley, 474 F.3d 923, 925–26 (6th Cir. 2007) (Martin, J., dissenting from denial of rehearing en banc) (discussing the political pressures that state court judges face to be "tough on crime"); Hon. Barbara J. Pariente & F. James Robinson, Jr., *A New Era for Judicial Retention Elections: The Rise of and Defense Against Unfair Political Attacks*, 68 FLA. L. REV. 1529 (2016) (discussing the political pressures state judges face).

221. Moran, *In Police We Trust*, *supra* note 18, at 962–70.

222. *See* Janet Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets* Brady, 109 PENN. ST. L. REV. 1133, 1149 n.81 (2005) ("Most judges were former prosecutors and retain their prosecutorial bias."); Andrew Manuel Crespo, *Regaining Perspective: Constitutional Criminal Adjudication in the U.S. Supreme Court*, 100 MINN. L. REV. 1985, 1987 (2016) (noting that, since 1975, the number of former prosecutors on the U.S. Supreme Court has more than tripled); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 912 (1995) (observing that some appellate judges

demographic that is often more disconnected than others from the realities of police misconduct.[223] Even well-intentioned judges make decisions based on implicit cognitive biases in favor of the police.[224] Cognitive bias research shows that when judges expect a police officer to be credible, and a defendant not, those judges are more likely to make evidentiary rulings that align with their expectations.[225]

III. RECOMMENDATIONS FOR REFORM

The flaw identified at the beginning of this Article—an imbalance in access to and ability to utilize evidence that could sway the jury's conclusions as to the credibility of a police officer versus a defendant, and thereby the jury's verdict—is both deep-rooted and multi-faceted. For decades, our legal system has treated police officers as favored players, deferring to their judgments and reluctant to acknowledge their

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are former prosecutors, which may influence their reluctance to hold prosecutors accountable); Editorial, *The Homogenous Federal Bench*, N.Y. TIMES (Feb. 6, 2014), https://www.nytimes.com/2014/02/07/opinion/the-homogeneous-federal-bench.html (last visited Sept. 30, 2018) ("[F]ederal judges continue to be drawn overwhelmingly from the ranks of prosecutors and corporate lawyers.").

223. Nikole Hannah-Jones, *Khalil Gibran Muhammad*, POLITICO (Apr. 2015) https://www.politico.com/magazine/story/2015/03/letter-from-black-america-police-115545 [https://perma.cc/7ES7-KTNB] (quoting Khalil Gibran Muhammad explaining that "[w]hite people, by and large, do not know what it is like to be occupied by a police force. They don't understand it because it is not the type of policing they experience."); Jaros, *Criminal Doctrines of Faith*, *supra* note 213, at 44 (commenting that "a more diverse bench might produce a more balanced view of how police and prosecutors actually act"); Erik Luna*, Hydraulic Pressures and Slight Deviation*s, 2008 CATO SUP. CT. REV. 133, 176 (2009) (noting that most white Americans "are unlikely to be stopped and frisked without good reason . . . [but] [t]he same cannot be said for others, particularly minority citizens"); Tracey E. George & Albert H. Yoon, *The Gavel Gap: Who Sits in Judgment on State Courts?*, AM. CONSTITUTIONAL SOC'Y (2016), http://gavelgap.org/pdf/gavel-gap-report.pdf [https://perma.cc/6D87-68V7] (analyzing data showing that more than half of state court judges are white men); Rich Morin & Renee Stepler, *The Racial Confidence Gap in Police Performance*, PEW RESEARCH CTR. (Sep. 29, 2016), http://www.pewsocialtrends.org/2016/09/29/the-racial-confidence-gap-in-police-performance/ [https://perma.cc/7DX8-N7FV] (noting that white people are far more likely to express trust in police).

224. *See* Findley & Scott, *supra* note 82, at 292 (describing the phenomenon of "tunnel vision," which leads police, prosecutors, and judges, to assume a suspect is guilty and filter all evidence and evidentiary decisions through that lens).

225. *Id.* at 314 ("This phenomenon can be particularly significant in criminal cases, where an individual is being judged—by police, prosecutors, defense lawyers, judges, and jurors—and where the initial working hypothesis presented to each actor in the system is that the defendant is guilty (despite the theoretical presumption of innocence."); *id.* at 308–09, 311–12, 324.

misconduct.[226] The evidentiary doctrines that enable this imbalance have been in effect, though heavily criticized, for decades as well.[227]

Nonetheless, these concerns are not without remedy, nor are the rules and doctrines that have contributed to this imbalance immutable. In Part III, I provide recommendations for reform in three major areas that have created the unfair credibility contests defendants face today: evidentiary doctrines, existence (or non-existence) of police records, and defense access to those records. I devote the most attention to the issues of existence of and defense access to police records, because the least has been written on these topics. My goal with these proposals is to create a playing field that is, at least in this limited area, level between the defendant and the government. A compelling argument could be made that even a level playing field is insufficient, and that it should slant in the defendant's favor, because many jurors come into trials predisposed to believe police officers,[228] distrust defendants,[229] and invert the presumption of innocence.[230] Although I am inclined to agree with this argument, one need not take such a strong position in order to accept the reforms I propose.

A. Existence of Police Records

A preliminary step to remedy a defendant's inability to obtain police misconduct records is ensuring that the records exist. The lack of empirical data surrounding police conduct (and misconduct) has been criticized since at least the famous Wickersham Commission report of 1931.[231] Despite numerous laws in the past several decades directed at

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226. *See supra* notes 17–19.

227. *See* sections I.B–D. (discussing other commentators' critiques of these doctrines).

228. *See* State v. Anderson, 111 P.3d 369, 380 (Ariz. 2005) (permitting two jurors to remain on jury after saying they would be inclined to give greater weight to testimony of police officer); Phoebe Ellsworth et al., *Juror Comprehension and Public Policy*, 6 PSYCHOL. PUB. POL'Y & L. 788, 811 (2000) ("[M]ost White Americans believe that police officers are the most trustworthy witnesses."); Amy Farrell et al., *Juror Perceptions of the Legitimacy of Legal Authorities and Decision Making in Criminal Cases*, 38 L. & SOC. INQUIRY 773, 786 (2013) (observing that white jurors in particular are likely to side with prosecutors and police officers in criminal cases).

229. Ellsworth et al., *supra* note 228, at 811 ("Most Americans—Black, White, and Hispanic—believe that a person on trial for a crime is probably guilty.").

230. *See* Laufer, *supra* note 16, at 349–50, 361–62, 367–69 (citing multiple sources for the conclusion that jurors are predisposed to believe the defendant guilty).

231. *See* NAT'L COMM'N ON LAW OBSERVANCE & ENF'T, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 155 (1931) (noting that "[w]e are without information that would enable us to state whether [an illegal police] practice, taking country as a whole, is increasing or decreasing"); Harmon, *supra* note 134, at 1121 (arguing that, in today's society, "we still lack enough information about what the police do to shape their conduct effectively").

improving the government's ability to track defendants arrested, charged, or convicted of crimes,[232] or engaged in other conduct the government deems suspicious,[233] far fewer efforts have been directed at recording police misconduct.[234] Funding for records collection is typically aimed at assisting, rather than assessing, law enforcement.[235] That must change.

I propose three remedies that each address different aspects of the recordkeeping crisis. First, states should, as a matter of state statute, require police departments to keep readily searchable records of certain data. This data should include, at a minimum: every instance of police use of force on a civilian; the number of arrests each officer makes and the race of the person the officer is arresting; the number of times each officer charges a civilian with resisting arrest, obstructing or interfering with the officer, assault of an officer, battery of an officer, or any other offense in which the officer claims to be the victim of the crime; and the number of times each officer has been the subject of a complaint, the basis of the complaint, and the results of any investigation into that complaint.

Second, prosecutor's offices should be required by law to maintain lists of every incident in which either (1) a judge finds a police officer lacking credibility in any case the office prosecuted or (2) the prosecutor's review of the case reveals that the police officer appears to have made false statements, whether written or oral, and whether during in-court testimony, in conversations with the prosecutor's office, or in police reports or communications with other police officers. Some jurisdictions already have a form of this list: in Washington D.C., the prosecutor's office maintains a list of police officers with "credibility issues," which they collect in part from information provided by the Metropolitan Police Department after an officer is disciplined.[236] Many, jurisdictions, however, have no system in place to create such lists, even when they have access to the information.[237]

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232. *See supra* section I.A.

233. *See supra* notes 23–30, 49–50.

234. Harmon, *supra* note 134, at 1135–36 (discussing the few national databases that record police data and the dearth of information they record, and noting that the government has no mechanism to catalog "the extent and kind of contact between police and victims and offenders [or] . . . the nature and result of disciplinary proceedings; citizen complaints; and information about police responses to service calls").

235. *Id.* at 1141–43 (noting that federal funding "overwhelmingly promote[s] databases for criminal law enforcement" rather than, for example, a national database of police officers who have been decertified based on misconduct).

236. *See* Abel, *supra* note 8, at 774–75 (and footnotes therein).

237. *Id.* at 775–79.

Lastly, I recommend requiring state or local independent agencies to collect and periodically audit the data I describe in my first two recommendations. In some jurisdictions, this could be handled by an existing agency such as an independent monitor, already tasked with reviewing complaints of civilian misconduct or providing recommendations to the police departments about policy reforms.[238] Many jurisdictions, however, still have no such agency, or have an independent review agency with so little authority that it cannot effect change.[239] In these situations, either a new entity must be created, or the existing body must be given expanded power to collect and review this data. At a minimum, the agency should be able to review the reports and determine whether the police departments and prosecutor's offices are actually collecting and submitting records. If, for example, one department reports no uses of force by its officers, then further investigation should be done to determine why no such records were kept. One reason I suggest this data be mandated by state statute, and collected by a state rather than local agency, is so that the data can be compared between jurisdictions; unless police departments use standardized reporting systems, it will be difficult to make any meaningful comparison among jurisdictions.[240]

B. Defense Access to Police Records

For purposes of this Article, my argument for reform of the police misconduct disclosure process—that is, allowing defense counsel access to police misconduct records—is limited to the context of criminal trials. Other scholars have, in contexts outside the criminal trial, called for increased transparency with respect to police practices, policies, and records.[241] While I agree with these scholars, and have myself advocated for improved public accountability in the realm of police records,[242] the need for access is at its most urgent in the context of a criminal trial, where the harsh consequences of a criminal conviction and subsequent loss of

238. For a directory of jurisdictions that already have some form of civilian oversight agency, see NAT'L ASS'N FOR CIVILIAN OVERSIGHT OF LAW ENF'T, POLICE OVERSIGHT BY JURISDICTION (USA), http://www.nacole.org/police_oversight_by_jurisdiction_usa. [https://perma.cc/3KPF-TXRP].

239. *See* Moran, *Ending the Internal Affairs Farce*, *supra* note 144, at 869–74, 878–82.

240. *See* Harmon, *supra* note 134, at 1131.

241. *E.g.*, *id.* at 1130–33; Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107 (2000); Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 678–79 (2004).

242. *See* Moran, *Ending the Internal Affairs Farce*, *supra* note 144; Moran, *In Police We Trust*, *supra* note 18, at 993–1003.

liberty are at stake. Accordingly, I focus my reform recommendations there.

One initial step in reforming the informational asymmetry defense counsel faces with respect to police officer witnesses would be to permit depositions of police officers in criminal cases. Most jurisdictions permit depositions rarely if at all in criminal cases,[243] and police officers can, and typically do, refuse to speak with defense counsel prior to trial. In these scenarios, counsel may have nothing but a police report authored by the officer, summarizing the police officer's investigation or role in the case, to prepare her cross-examination at trial. A deposition, in which counsel can ask the officer about his prior history, could be one step in the direction of remedying the informational imbalance. It is not, however, a sufficient step. In states where police records are generally deemed confidential, one can easily imagine the deposition devolving into constant objections by the officer's representative, necessitating a need for judicial involvement into the issue of what information may be disclosed. Additionally, if the officer lies about his previous history, defense counsel may be none the wiser.

My primary contribution for the reform of defense access to police records comes in the form of a model statute dictating how criminal courts should handle defendants' requests for police personnel records. There is, as Jonathan Abel points out, "no nationwide consensus" on the issue of whether, when, and how to disclose police personnel records in criminal cases.[244] This model statute offers a possible solution that virtually any jurisdiction, even those favoring strict confidentiality provisions for police records, could adopt. I first provide the model statute below, and then explain the import of each of its component parts.

The proposed statute reads as follows:

> **Defendant's Right to Law Enforcement Personnel Records in Criminal Cases.**
>
> This statute applies to all criminal prosecutions in which a current or former law enforcement officer is involved in the case as a complainant, alleged victim, or witness for the prosecution, provided the officer's involvement arose from an incident that occurred while the officer was acting in an official capacity as an officer.

243. LAFAVE ET AL., *supra* note 191, at 1235 (noting that only ten states permit depositions in criminal cases); *see also* FED. R. CRIM. P. 15(a).

244. Abel, *supra* note 8, at 747.

(1) Information known to prosecution. In all cases in which the prosecution has actual or constructive knowledge that the personnel records of a law enforcement officer involved in the case contain potentially exculpatory information, the prosecution shall provide reasonable notice to the defendant in advance of trial that this information exists. Constructive knowledge is defined as actual knowledge by an agent of the prosecution, including law enforcement officers within the jurisdiction in which the prosecution operates, provided that the prosecution is legally authorized to access this information.

(a) If otherwise permitted by law, the prosecution shall provide to the defendant in advance of trial all potentially exculpatory information in the personnel records of the officer.

(b) If the prosecution is not otherwise permitted by law to provide this information to the defendant, then the prosecution may satisfy its burden of disclosure by notifying the defendant that the information exists.

(2) Information requested by defendant. Regardless of whether the prosecution discloses information to the defendant pursuant to section (1) of this statute, a defendant in any criminal case in which a law enforcement officer is a witness for the prosecution may move for a subpoena *duces tecum* of the personnel records of that officer. The defendant shall serve this motion on the court, the prosecution, the law enforcement agency in possession of the records, and the individual law enforcement officer whose records the defendant is seeking.

(a) Upon filing of the motion for subpoena *duces tecum*, all parties on whom the motion was served shall have seven days to respond. If no objection is filed within seven days, the court shall grant the motion and order the agency in possession of such records to disclose the records to the defendant without redaction.

(b) If any party on whom the motion for subpoena *duces tecum* was served objects to the defendant's motion, the

trial court shall hold a pretrial hearing to determine whether the records should be released. Prior to the hearing, the party objecting to the subpoena *duces tecum* shall make the records available for inspection, under seal, to both the court and defense counsel. At the hearing, the court shall determine whether the records will be released to defense counsel. Notwithstanding any other provision of law addressing the confidentiality of the records, the court shall order the records to be released to defense counsel unless the party objecting to release of the records can show that the records (i) contain no exculpatory information, or (ii) are not arguably material to the case. In determining whether the records shall be released, the court shall consider: the content of the records; the significance of the officer's testimony to the government's case; and the significance of the records to the defendant's articulated theory of defense.

(3) Admissibility of records. If the court determines that the records shall be released, their admissibility and use at trial shall be governed by the Rules of Evidence.

(4) Confidentiality of records. At all times throughout the criminal case, the personnel records at issue shall be released only under a protective order, which governs both the prosecution and the defendant. The terms of the protective order include:

(a) Access to the personnel records shall be limited to the attorneys and the defendant.

(b) Release of any information contained in the subpoenaed files shall be used solely for the defense or prosecution of the instant case.

(c) Copies of the personnel records shall be made only for purposes of prosecuting or defending the case, and shall be returned to the court at the conclusion of the case, to be retained in a sealed portion of the court file.

(d) The court retains continuing jurisdiction for purposes of enforcing compliance with the protective order. Any

> violation of the order may subject the offending party to contempt or other sanctions.

Title and opening clause: This section is intended to make clear that the statute applies to all criminal prosecutions in which a law enforcement officer may testify on behalf of the government. The broad language of the statute removes any obligation for the prosecution to determine whether the officer is a critical witness in the case, and thus whether, in the prosecutor's opinion, the information actually need be disclosed. Although that consideration may be pertinent to the ultimate issue of whether the personnel records or information contained therein can be used at trial, it should have no bearing on the preliminary determination of whether the defendant needs to be notified about information regarding this officer. Additionally, the statute is narrowly applicable only to criminal cases because defendants have the most to lose in criminal prosecutions, and therefore the greatest interest in this kind of information. Although a similar statute may well be appropriate for civil cases, that is not the topic of this Article.

Section (1): This section mandates that, when a prosecutor's office or agent of the prosecution has knowledge that personnel records pertaining to a law enforcement witness contain potentially exculpatory evidence, it notifies the defendant about that information. This provision is important because, as Jonathan Abel points out, many jurisdictions treat police personnel records as exempt from *Brady*, and do not require prosecutors to notify defense counsel even if the records contain exculpatory information.[245] Other prosecutor's offices, apparently believing that they can sidestep *Brady* by simply not learning about the records, actively attempt to avoid learning about exculpatory information within the records.[246] My model statute addresses this problem by specifying that prosecutors must disclose this information if they know or have constructive knowledge of the records, and makes clear that constructive knowledge, consistent with *Kyles v. Whitley*,[247] includes information in the possession of the police department as long as the prosecution may legally access this information.[248]

Pursuant to subsection (1)(a), if the prosecution is permitted by law to provide the records to defense counsel, it must do so. This provision circumvents the need for lengthy pretrial hearings in which the defendant

245. *Id.* at 745, 773–78 (and citations therein).

246. *Id.*

247. 514 U.S. 419 (1995).

248. *Id.* at 437.

must request the records and the court must determine whether they should be released; in jurisdictions where the prosecution has access to the records and they are not otherwise confidential, the statute requires the prosecution to release the records. However, because police personnel records are confidential in many jurisdictions, and not within the ability of the prosecution to disclose,[249] subsection (1)(b) acknowledges that, in these jurisdictions, the prosecution can comply with *Brady* by providing notice to the defendant of the existence of the records.

Section (2): Section (2) dictates the procedure for defense counsel to obtain law enforcement personnel records that either are not known to or cannot be disclosed by the prosecution. In these cases, section (2) makes clear that the defendant still has a right to request such records. Unlike section (1)(a), which applies to records that are not confidential, section (2) permits the prosecution, law enforcement agency, or individual officer to object to disclosure of the records. If no one objects, subsection (2)(a) mandates that the court grant the defendant's motion and order that the records be disclosed defense counsel. This provision is important because many jurisdictions either do not require courts to disclose law enforcement records under any circumstance, or provide that the records need only be disclosed in a subset of specified cases, such as those involving claims of assault or battery on an officer.[250] Such laws underestimate the scenarios in which an officer's credibility will play an important role in the trial, and give inadequate weight to a defendant's constitutional right to exculpatory evidence in the government's possession.[251] Subsection (2)(a) addresses this concern by explicitly providing that the court must disclose the records absent objection from an interested party.

Subsection (2)(b) addresses the scenario in which either the prosecution, law enforcement agency, or officer objects to disclosure of the records. In this case, the court is directed to decide the issue of whether the records should be disclosed prior to trial, in a hearing at which all interested parties may present arguments about why the records should or should not be disclosed. My proposed statute represents a significant departure from many jurisdictions in three ways.

First, subsection (2)(b) allows defense counsel to inspect (though not take possession of) the records prior to the hearing in which the court determines whether they should be released. I acknowledge this is a

249. *See supra* section II.B.

250. *See supra* sections II.B–C.

251. U.S. CONST. amend. XIV; Brady v. Maryland, 373 U.S. 83, 87 (1963).

potentially controversial point, and that many jurisdictions prefer in camera inspection of personnel records by the court alone, after which the court may in its discretion determine whether the records should be disclosed.[252] Although the practice of in camera review is intended to protect an officer's right to the privacy of the officer's personnel records, my objection is that trial judges are ill-equipped to determine, prior to trial, whether the records are relevant to the defendant's theory of defense. The U.S. Supreme Court has for this reason criticized the "practice of producing government documents to the trial judge for his determination of relevancy," because the court, without input from the defense, cannot properly determine the relevance of the records.[253] And the defendant, without access to the records, cannot adequately weigh in on how the unknown records might affect the theory of the defense. At least one state supreme court has also rejected the practice of in camera review of potentially-confidential records, concluding that trial judges cannot properly make determinations about relevance without knowing "what is or is not inconsistent or immaterial to the defendant's case."[254]

Second, section (2)(b) presumes that the personnel records should be released and allows the party objecting to release to overcome this presumption only by showing that the records are either not exculpatory, or not arguably material to the defendant's case. The presumption of release is intended primarily to address what I describe in sections II.B and II.C as problems associated with political willpower and judicial deference. For many judges it is all too easy to simply decline to release law enforcement records, because opposing law enforcement is not politically popular, they do not want to afford time in their busy dockets to litigate hotly-contested issues pertaining to disclosure of these records, or they have trouble envisioning how an officer's prior history could be relevant to the defense.[255] Making the records presumptively releasable addresses this problem by requiring judges to state a specific, legitimate basis for denying release of the records, and provides an opportunity for closer scrutiny on appeal of judge's decisions to deny release of the records.

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252. *E.g.*, AURORA, COLO. MUNI. CODE. § 50-41(b)–(c) (2017) (requiring in camera review of personnel records to determine whether and which information shall be admissible); N.Y. CIV. RIGHTS LAW § 50-a(3) (2017) (requiring police personnel records to be sealed and sent to judge for review to determine admissibility after such a request has been made).

253. Jencks v. United States, 353 U.S. 657, 669 (1957).

254. Jones v. State, 464 A.2d 977, 982 (1983).

255. *See supra* section II.C.

Third, the model statute I propose does not allow the court to refuse to disclose the records based solely on the likelihood of harm to the privacy interests of the police officer. Nor does it direct the court to consider an officer's privacy interests when determining whether to release the records. The statute does appropriately take into account the officer's privacy interests in section (4), which limits each party's use of the records to the specific context of the criminal case. Although the notion that police officers have a privacy interest in their personnel records is often used as basis for refusal to disclose the records,[256] in the context of a criminal case, such interests cannot properly take precedence over a defendant's constitutional right to disclosure of exculpatory evidence.[257] Instead, the factors I direct the court to consider—the content of the records, importance of the officer's testimony to the government's case, and importance of the records to the defendant's theory of defense—are all aimed at determining whether the evidence is exculpatory and material under *Brady* and its progeny.[258] Should the records meet this test, then they must be disclosed to the defendant.

For the same reason—that defendants' constitutional right to exculpatory evidence in criminal cases trumps officers' privacy interest in their personnel records—the statute provides that the records shall be released "[n]otwithstanding any other provisions of law addressing the confidentiality of the records." The model statute is intended to preempt any other statutes or rules of law addressing the confidentiality of police personnel records.

Section (3): Section (3) is designed to make clear that, when records are released to defense counsel, their admissibility should be evaluated like any other evidence. I include this provision because, as discussed in Part II.C, when courts interpose the admissibility determination with the decision whether to release the records, they tend to err on the side of refusing release. This section makes clear that the issues of access to and use of the records are not interchangeable, and thus encourages courts to release the records.

Section (4): Section (4) protects officers' privacy interest in not having their personnel records disclosed to the public, and balances, to the extent constitutionally permissible, that interest against the defendants' constitutional right to exculpatory evidence. This section makes clear that the records are disclosed only for purposes of the criminal case, and may

256. *See* Martinelli v. Dist. Court, 612 P.2d 1083, 1091–92 (Colo. 1980) (en banc); City of Hemet v. Superior Court, 37 Cal. App. 4th 1411, 1429 (Cal Ct. App. 1995).

257. U.S. CONST. amend. XIV; Brady v. Maryland, 373 U.S. 83, 87 (1963).

258. *Brady*, 373 U.S. at 87; *see also* Kyles v. Whitley, 514 U.S. 419, 434–37 (1995); United States v. Bagley, 473 U.S. 667 (1985).

not be used for any other purpose. Once the criminal case is over, all records are to be returned to the court, under seal, and not used or distributed for any other purpose.

The model statute can, of course, be adapted to the vagaries of each particular jurisdiction—in systems where police records are a matter of public record, the statute may be condensed to remove any concessions to confidentiality. But in the majority of jurisdictions, where confidentiality is a common basis for objections to disclosure of the records and litigation is generally decided in favor of the officer, this statute could serve the important purposes of actualizing a defendant's constitutional right to exculpatory evidence and thereby righting the scales that currently tip heavily against a defendant's ability to contest the credibility of police officer witnesses.

C. Evidentiary Reforms

As discussed in Part I, three primary evidentiary rules and doctrines—Rule 609, Rule 404(b), and the res gestae or inextricably intertwined doctrines—are responsible for creating most of the government's opportunities to introduce evidence of a defendant's other acts or character that are not integral to the charged crime.[259] Scholars and defense practitioners have criticized these rules for years, pointing out that once a jury hears of a defendant's prior convictions or past bad acts, that information tends to dominate the trial and dissuade the jury from focusing on the government's proof with respect to the charged crime.[260] These critiques are all the more important in today's climate, where the government has near-instant access to a tremendous amount of information about the defendant that, before recent advances in technology, it did not have.[261] Whereas in the past a defendant's prior history may have played a role in only a small percentage of cases, in recent years it has taken on an increasingly central role in criminal trials, such that introduction of prior convictions and other acts evidence is no longer rare at all.[262] Even if these rules made sense at one time (a theory open to much dispute), they no longer do.

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259. *See supra* sections I.B–D.

260. *Id.*

261. *See supra* section I.A.

262. United States v. Miller, 673 F.3d 688, 692 (7th Cir. 2012); Blinka, *supra* note 92, at 110–12; Imwinkelried, *The Second Coming of* Res Gestae, *supra* note 13, at 726; Sonenshein, *supra* note 92, at 219.

1. Narrow the Scope of Rule 609 with Respect to Criminal Defendants

The applicability of Rule 609(a), permitting impeachment with prior felony convictions, to criminal defendants is perhaps the most heavily-criticized of all the evidentiary rules. Scholars have faulted it for relying on false assumptions about the credibility of people with prior convictions[263] as well as the reliability of those convictions,[264] disincentivizing defendants from testifying,[265] contributing to racial biases and hyper-involvement of black defendants in the justice system,[266] providing no meaningful guidelines for judges speculating about the probative value of such convictions,[267] and giving prosecutors a too-powerful tool for winning otherwise weak cases.[268]

I agree with many of these critiques, and I join the growing chorus of scholars advocating for complete or near-abolition of Rule 609(a) as applied to criminal defendants.[269] A few states—Hawaii, Kansas, and Montana—have already done so.[270] Montana's rule goes the furthest, and completely bans evidence of prior convictions for use in impeaching defendants or any witnesses.[271] In Kansas and Hawaii, evidence of a defendant's prior conviction can be introduced only if the conviction involved dishonesty, and only if the defendant first introduced evidence suggesting good moral character.[272]

The primary criticism from those who believe abolition is too drastic a remedy is that it will be unfair for the government if defendants can testify and portray themselves as law-abiding citizens, when the government

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263. Roberts, *Conviction by Prior Impeachment*, *supra* note 16, at 1978; Roger C. Park & Michael J. Saks, *Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn*, 47 B.C. L. REV. 949, 964 (2006).

264. Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 563, 565 (2014).

265. Friedman, *supra* note 66, at 639; Roberts, *Reclaiming the Importance of the Defendant's Testimony*, *supra* note 64, at 836.

266. *See, e.g.*, Carodine, *supra* note 16, at 521; Roberts, *Impeachment by Unreliable Conviction*, *supra* note 263, at 576–78; Roberts, *Reclaiming the Importance of the Defendant's Testimony*, *supra* note 64, at 838–39, 864–67.

267. Roberts, *Reclaiming the Importance of the Defendant's Testimony*, *supra* note 64, at 842.

268. *See id.* at 858–59; Carodine, *supra* note 16, at 524; Ladd, *supra* note 66, at 186.

269. *See* Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. DAVIS L. REV. 289, 318–19 (2008); Blume, *supra* note 63; Carodine, *supra* note 16, at 524; Roberts, *Conviction by Prior Impeachment*, *supra* note 16.

270. *See* KAN. STAT. § 60-421 (2011); HRS § 626-1, Rule 609(a); MONT. R. EVID. 609.

271. MONT. R. EVID. 609.

272. KAN. STAT. § 60-421 (2011); HRS § 626-1, Rule 609(a).

knows that to be false but cannot do anything about it.[273] But that extreme situation need not be the rule. One remedy, which few commentators identify, is that in such a situation the government could utilize Rule of Evidence 404(a)(2)(A), which states that, if a defendant introduces evidence of the defendant's own pertinent character trait, the government may introduce evidence to rebut that trait.[274] Under that Rule it would appear that, if the defendant explicitly testified to beings a law-abiding citizen with no prior convictions, the government could rebut that testimony with evidence of the prior conviction, irrespective of Rule 609.

Setting Rule 404(a)(2)(A) aside, another possible and easily-implemented solution to the problem of unrebutted false testimony from a defendant is to permit use of the prior conviction for impeachment purposes in just one instance: when the defendant falsely testifies that the defendant has no such prior convictions.[275] As long as the defendant does not open the door to this information by demonstrably untrue claims regarding a lack of prior convictions, the government may also not inquire into the prior conviction.[276] Such a rule assuages the concerns of prosecutors who believe their hands will be tied by an absolute ban on prior conviction evidence, but takes significant steps toward righting the imbalances in the evidence the government can use to attack defendant credibility.

Rule 609(a)(2), in contrast to (a)(1), permits impeachment by convictions that involve a "dishonest act or false statement," and requires courts to admit such convictions without any analysis of their probative value or prejudicial effect.[277] Although convictions for dishonesty or falsehoods have at least superficially more relationship to general credibility, a compelling case can be made for abolition of this rule as well, save for the case where the defendant falsely volunteers that the defendant has no such convictions. Many offenses that fall within the

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273. *See* United States v. Lipscomb, 702 F.2d 1049, 1077 (D.C. Cir. 1983); State v. Brunson, 625 A.2d 1085, 1092 (N.J. 1993) (allowing impeachment by prior conviction to "insure that a prior offender does not appear to the jury as a citizen of unassailable veracity").

274. FED. R. EVID. 404(a)(2)(A).

275. *See* State v. Burnett, 558 P.2d 1087, 1090–91 (Kan. 1976) (permitting impeachment of a defendant with prior conviction if the defendant explicitly denies having such a conviction); Roberts, *Conviction by Prior Impeachment*, supra note 16, at 2036 (proposing a rule of evidence that reads, "In a criminal case where the defendant takes the stand, the prosecution shall not ask the defendant or introduce evidence as to whether the defendant has been convicted of a crime for the purpose of attacking the defendant's credibility. If the defendant denies the existence of a conviction, that denial may be contradicted by evidence that the conviction exists.").

276. *See* Roberts, *Conviction by Prior Impeachment*, *supra* note 16, at 2036.

277. FED. R. EVID. 609(a)(2).

category of "dishonesty," particularly theft and shoplifting, are often more probative of poverty and desperation than they are inclination to lie while testifying.

Even if a jurisdiction is not willing to abandon impeachment by prior convictions involving dishonesty, at a minimum it should narrow the triggering convictions to include only those for false statements made under oath in court, rather than "dishonest acts." West Virginia has already done this, adopting a rule that, for purposes of attacking the credibility of a defendant in a criminal case, "evidence that the accused has been convicted of a crime shall be admitted but only if the crime involved perjury or false swearing."[278] Such a rule would inform the fact-finder when the defendant has previously been convicted for testifying falsely in court, but would weed out actions such as burglary, theft, sale of narcotics, and other offenses courts include in the category of dishonest acts, that have little or no proven connection to a defendant's likelihood of lying in court.[279]

2. Add an Evidentiary Burden to Rule 404(b)

Rule 404(b), as discussed in section I.C, allows the prosecution to introduce other acts by the defendant under the guise of proving motive, intent, knowledge, or a wide variety of other issues.[280] Although Rule 404(b) is preferable to the res gestae doctrine in that it requires the evidence to be admitted for a specific, identified purpose, it still provides insufficient guidelines for courts to determine whether the evidence should be admitted. It contains no standards for assessing whether the evidence is relevant, or for determining whether the other acts actually occurred. Instead, Rule 404(b)(2) simply says that other acts evidence "may be admissible" for a purpose other than to prove bad character and dictates only that the prosecution must provide reasonable notice in advance of trial, or during trial if it can show good cause for the delay.[281]

I propose a two-part amendment to the existing rule, designed both to provide guidance for courts to determine whether other acts should be admitted, and tamp down on the tendency of prosecutors and courts to allow other acts evidence to dominate criminal trials.[282] The amendment,

278. W. VA. R. EVID. 609(a)(1).

279. *See* United States v. Brown, 603 F.2d 1022, 1029 (1st Cir. 1979); United States v. Ortiz, 553 F.2d 782, 784 (2d Cir. 1977); State v. Ray, 116 Wash. 2d 531, 544–45, 806 P.2d 1220, 1228 (1991).

280. *See supra* section I.C.

281. FED. R. EVID. 404(b)(2).

282. *See supra* Part I.

which would be styled Rule 404(b)(3) under the numbering scheme of the federal rules, reads:

> (3) The party seeking to introduce evidence of a crime, wrong, or act other than the charged offense has the burden of proving in a hearing outside the presence of the jury, that:
>
> (A) By a preponderance of the evidence, the other act was committed by the defendant; and
>
> (B) The probative value of the evidence substantially outweighs the risk of unfair prejudice to the defendant.

The proposed amendment would increase the reliability of other acts evidence, by requiring a hearing (in most cases, pretrial) to determine whether the other act was in fact committed by the defendant. This is important because, as discussed in section I.C, many courts allow the government to admit other acts evidence based on charges that were dismissed or acts that were never charged at all, which presents both a question of reliability and a grave risk of unfair prejudice to the defendant.[283] Currently, Rule 404(b) contains no language addressing the standard for determining whether other acts evidence is sufficiently reliable to use at trial,[284] and courts have no uniform standard for determining reliability.[285] The U.S. Supreme Court has set the bar extremely low, dismissing even the preponderance standard and holding that judges may admit other acts evidence as long as there is "sufficient" evidence for a jury to find that the other act occurred.[286] Other jurisdictions apply a preponderance standard, but reject the requirement of a pretrial hearing and instead find the evidence sufficiently reliable as long as a reasonable jury could find by a preponderance during trial that the other act occurred.[287] My proposed amendment would add needed clarity to the reliability determination, and give pause to courts otherwise prone to cede their gatekeeping function to the jury.

The proposed amendment would also deter courts quick to admit this evidence, by placing the burden on the government to prove, and courts

283. *See supra* section I.C.

284. *See* FED. R. EVID. 404(b).

285. *See supra* notes 90–93.

286. Huddleston v. United States, 485 U.S. 681, 688–89 (1988).

287. *See* United States v. Gomez, 763 F.3d 845, 845 (7th Cir. 2014).

to find, that the evidence is substantially more probative than prejudicial—the opposite of the standard for admissibility under Rule 403.[288] This heightened burden could slow down the tidal wave of other acts evidence admitted at trial, and provide greater opportunities for appellate courts to scrutinize trial courts' application of Rule 404(b).

3. Abolish the Res Gestae or Inextricably-Intertwined Doctrine

Although the res gestae or inextricably-intertwined doctrine is codified in only a few states,[289] it is accepted by case law in every federal jurisdiction and many states.[290] As discussed in section I.D, this doctrine serves primarily as an end-run around Rule 404(b), by permitting evidence of acts that are not the basis of the charged crime, as long as these acts are deemed helpful to the jury's understanding of the charged crime.

The doctrine causes significantly more harm than good, and I recommend abandoning it completely. Its purported purpose is to allow the jury context for understanding the charged offense.[291] Rule 404(b), however, already provides that opportunity. If the evidence can be used for a specific purpose, such as showing motive to commit the charged crime (or any of the other many reasons 404(b) evidence is introduced), then the government can provide notice to the defendant of its intent to use this evidence pursuant to Rule 404(b), and attempt to elicit the evidence that way.[292] If the evidence does not fall within any of the existing exceptions, this may be a signal that the government wants to use the evidence simply to make the defendant looks worse in the eyes of the jury.[293] Since this doctrine has no standard by which the judge should measure admissibility, courts nearly always default to allowing the

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288. *See* FED. R. EVID. 403 (permitting courts to "exclude relevant evidence if its probative value is substantially outweighed by a danger of," inter alia, unfair prejudice).

289. *See, e.g.*, KY. R. EVID. 404(b)(2); LA. CODE EVID. ANN. art. 404(B) (2010); NEV. REV. STAT. § 48.035(3) (2007).

290. *See* Imwinkelried, *The Second Coming of* Res Gestae, *supra* note 13; *supra* note 117 (listing cases).

291. People v. Quintana, 882 P.2d 1366, 1373 (Colo. 1994); Imwinkelried, *The Second Coming of* Res Gestae, *supra* note 13, at 726.

292. Imwinkelried, *The Second Coming of* Res Gestae, *supra* note 13, at 726 (explaining that, in many inextricably-intertwined cases, prosecutors could have "just as easily" relied on Rule 404(b) to admit the evidence).

293. *Id.* at 723, 728–30; *see also* United States v. Edwards, 581 F.3d 604, 608 (7th Cir. 2009); United States v. Bowie, 232 F.3d 923, 927–29 (D.C. Cir. 2000) (describing the inextricably-intertwined doctrine as a "convenient vehicle" for prosecutors to circumvent the evidentiary rules); United States v. Ameri, 297 F. Supp. 2d 1168, 1169, 1172 (E.D. Ark. 2004).

evidence.[294] In the majority of states, the doctrine does not require advance notice to the defendant—in contrast to Rule 404(b), which requires prosecutors to notify defendants prior to trial of their intent to use other acts evidence[295]—and can therefore be used as a means of ambush at trial. Abandoning this doctrine would require the prosecution to notify the defendant prior to trial—an important protection of the defendant's right to meaningfully confront opposing witnesses[296]—and give the court at least some standard for measuring the admissibility of the evidence, i.e., whether the government can articulate a specific purpose for the evidence other than to show that the defendant is a bad person.

CONCLUSION

Defendants should not be condemned to lose at trial simply because the key witness against them is a police officer. Much needs to be done, on a variety of fronts, to remedy the existing disparity in the information the government can access and use against defendants in criminal trials, versus the information defendants can obtain or use regarding police officer witnesses. Although these inequities will take significant thought and political will to address, the reforms I propose represent concrete steps toward righting a longstanding imbalance prejudicing defendants in their attempts to contest the credibility of police officer witnesses.

294. *E.g.*, United States v. Senffner, 280 F.3d 755, 763–65 (7th Cir. 2002); United States v. Ripinsky, 109 F.3d 1436, 1442 (9th Cir. 1997).

295. FED. R. EVID. 404(b)(2).

296. U.S. CONST. amend. VI; Davis v. Alaska, 415 U.S. 308 (1974); State v. Graham, 314 S.C. 383, 385 (1994).